Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

October Term, 1994

MEREX A.G.,

Petitioner,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDICES
TO
PETITION FOR WRIT OF CERTIORARI

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APPENDICES

APPENDIX A - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 29, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)
OPINION AND ORDER

APPEARANCES

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MARY JOHNSON LOWE, U.S.D.J.

Plaintiff, Merex A.G. ("Merex"), is an international trading and brokerage company located in what was formerly known as West Germany. Defendant, Fairchild Weston Systems, Inc. ("Fairchild"), is a United States corporation whose principal place of business is Syosset, Long Island, New York. This action is brought under the diversity jurisdiction of the Court.[1] 28 U.S.C. § 1332.

This action grows out of Merex's claim that it is entitled to collect a fee or commission, pursuant to an oral agreement, for introducing Fairchild to the Peoples Republic of China ("PRC") where a business opportunity was consummated between defendant and the PRC.

The claims for breach of contract, quantum meruit and declaratory judgment were dismissed after hearing on defendant's Fed.R.Civ.P. 50 motion. Since the only remaining claim was an equity claim of promissory estoppel, the Court informed the parties that the trial would proceed with the jury sitting as an advisory jury.[2] The jury returned a general verdict for plaintiff. Defendant timely moved for the Court to render a verdict for defendant. Plaintiff moved for recusal.

Rule 39. Trial by Jury or by the Court

(a) *By Jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon

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[1]Named plaintiff Merex Corporation was dismissed during trial; named plaintiff Peter Lachmann and defendant settled during trial.

[2]Where legal claims have been dismissed and only equitable claims remain, it is common practice to deem the jury an advisory jury for purposes of the equitable claims. *E.g., Sterling v. Environmental Control Bd.*, 793 F.2d 52, 54-55 (2d Cir.), cert. denied, 479 U.S. 987 (1986); *Morrison v. United States Lines*, No. 80 Civ. 5112 (S.D.N.Y. March 2, 1983) (LEXIS, Genfed Library, Dist file). *See generally* 9 Charles A. Wright & Arthur A. Miller, *Federal Practice and Procedure* § 2337, at 130 (1971) ("[J]ury and nonjury issues . . . may be tried simultaneously, with the jury rendering a verdict on the jury issues and the court making findings on the nonjury issues. The matter is in the discretion of the court so long as the order of trial is so arranged that it preserves the right of trial by jury on the jury issues.")

the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

* * *

(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury...

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the rounds of its action....

Findings of Fact

Plaintiff Merex alleged that in the late Summer of 1982 Robert Neasham ("Neasham"), defendant's European market manager, approached Gerhard Mertins ("G. Mertins") , the president of Merex, at his office in West Germany, and informed him that Fairchild would be interested in selling its system of military aerial surveillance cameras -- the LORAP/MTRF System -- to the PRC.[3]

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[3]Peter Lachmann, Fairchild's sales representative in Europe, introduced the parties and was present at their meetings.

Fairchild had no contacts with the PRC, and Mertins had an ongoing business relationship with that country.

G. Mertins alleges that at the meetings with Neasham in the late summer of 1982 he informed Neasham that such a deal could be arranged but he required a ten percent commission -- an amount later reduced to eight percent. G. Mertins testified that no distributorship was discussed and that he and Neasham agreed he would earn his commission upon any Fairchild sale to the PRC. The shook hands on the deal. G. Mertins believed he had reached a agreement with Fairchild through Neasham. G. Mertins testified:

> I asked him what is your authority? How long have you been with the company? He told me he was a lieutenant colonel in the Navy [sic] . . .
>
> I told him: We are together, the two old soldiers, and we have a good understanding. He [Neasham] said: Naturally, Fairchild is a generous company. And...he asked me: What is your request? I said: We are making such deals normal on the base of 10 percent of the sales value...
>
> And he agreed. He said: Even if it is going -- he promised even more. I said: No, we will make the deal for 10 percent.
>
> He was agreed.... [W]e confirmed our agreement with [sic] shake hand.[4]

G. Mertins further testified that his German attorney advised him that such an oral contract was valid and enforceable under German law.

On August 26, 1982, Merex telexed Fairchild:

> To efficiently pursue projects, it will become necessary for us to be granted your rights to act as Fairchild distributors.

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[4]Trial Tr. at 342-343.

Kindly consider this matter and advise.[5]

Neasham testified by deposition that during the meeting with G. Mertins:

> It was explained in exactly the terms that I had authorization to do. We could sell to Merex Corporation the systems involved, they would be, in turn, for Merex to mark it up and sell those to the Peoples Republic of China...[6]

Neasham further testified:

> Mertins, G.G. Mertins -- not anybody else -- said that he could provide the financial arrangements to finance us under our normal government schedule of payments, and he would take the payment from the Peoples Republic of China and carry that financial burden. That's why he could mark it up for resale. [7]
>
> * * *
>
> Merex said he had enough money to do this, and that was going to be his role in this thing, was to carry on marketing activity and the liaison, and he would resell the system..... to the PRC.[8]

When asked if commissions had been discussed, Neasham replied:

> There were no commissions. Commissions were the big problem area in these things because these people were not a sales representative; they were a group, a company that

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[5]Trial Ex. B; Trial Tr. at 446-448.

[6]Trial Tr. at 1574.

[7]Trial Tr. at 1580.

[8]Trial Tr. at 1581.

> wanted to buy these things, buy these things and resell them. There was no commission, nothing. And I wouldn't be able to discuss that anyway.
>
> There was [sic] no commissions discussed at this meeting primarily because I am not authorized by my company to state company policy on commissions per se, as to their amount.... That is the company lawyer -- Legal and Executive Departments that do those things.[9]

Lachmann testified:

> Neasham's proposal was to pay to Merex, on a sale/resale basis their requested recompensation or commission, and the amount that remained, Merex did request at that time, 10 percent of the sales price, which would be reached in their -- with the contract with the Peoples Republic of China.
>
> Mr. Mertins felt very clearly at the beginning, in the first meeting, and following on in the next meetings in that summer (with Neasham), that an arrangement or how the commission or the recompensation [sic] of Merex I should be structured is not in the hands of Merex nor in the hands of Fairchild because this depends largely on the wish of the customer of the Peoples Republic of China.
>
> So Mr. Mertins said that no matter how this 10 percent would be structured, as long as Merex, A.G. would get paid, they would accept it, no matter which type of structuring of this 10 percent should be paid finally.[10]

Regarding Neasham's response, Lachmann testified:

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[9]Trial Tr. at 1575. Neasham testified that he informed G. Mertins that he had no authority to bind Fairchild, and that only a corporate officer could. Trial Tr. at 1587.

[10]Trial Tr. at 55-56, 230.

> Fairchild surely would pay a commission, and Mr. Neasham brought in the discussion concerning the sale/resale...the commission on a sale/resale basis through a mark up.[11]

Pighi and Lay testified that Fairchild was reluctant to do business in China in 1982 because China was just coming out of the cultural revolution and there was much instability in the country. Because of these conditions, Fairchild did not want to deal directly with the Chinese. Merex and G. Mertins, however, impressed Fairchild as well-connected and sophisticated, particularly with respect to the PRC. Fairchild decided to explore its possibilities with Merex.

In late August, 1982, Merex set up a meeting between Lachmann, Neasham and a delegation from NORINCO, a PRC purchasing agency. Neasham made a presentation of the LORAP camera system, and G. Mertins, Lachmann and Neasham were invited to the PRC for further discussions. In September of 1982, G. Mertins travelled to Fairchild's headquarters in New York and met with Louis Pighi, President of Fairchild, and Chris Lay, Fairchild's vice-president.

Fairchild, at the September meeting, told G. Mertins that the only way they would consider a deal with the PRC was for Merex to secure the financing. Fairchild would sell the camera system to Merex, and Merex would add to the Fairchild ex-factory price a sum for a Merex commission. Merex was then to negotiate a resale to the PRC. Mr. Lay testified that the sale/resale format was proposed so that Merex would take the risk of negotiating and collecting against a payment clause [Clause 22].[12] Fairchild would assume the responsibilities of manufacturing the cameras per the PRC specifications, installing them on the military airplanes, and supervising their functioning for a limited period.[13]

All parties agree that they discussed the proposed sale to the

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[11]Trial Tr. at 57. Mr. Lachmann is a German National and English is his second language.

[12]Merex's responsibilities for financing and negotiating were set out in the Blue/Red Book called the "Commercial" part of the proposed contract.

[13]This was called the "Technical" part of the proposed contract.

PRC in terms of a distributorship, or sale/resale on back to back contracts, in which Merex was to receive a commission by marking up Fairchild's price and re-selling to the PRC.

G. Mertins testified that he believed the sale/resale was nonsense and rejected the proposal. After he returned to Germany, he continued his efforts with the Chinese. He testified that he did so based on the handshake agreement he made with Neasham. [14]

On October 6, 1982, G. Mertins wrote Lay:

> For reasons verbally explained, we would like to work as distributors for you.[15]

Accepting the August invitation extended in West Germany by the PRC delegation, G. Mertins, Lachmann and Neasham met with the PRC purchasing delegates in Beijing from November 7 through November 19, 1982. During these meetings, Lachmann and Neasham presented technical details of the LORAP/MTRF system to various PRC representatives. Neasham had proposed a sale of five systems. At the close of these meetings, at Neasham's request, the PRC prepared a proposed Letter of Intent. Neasham found the PRC form unacceptable. He then prepared a new Letter of Intent which was accepted by NORINCO. This document was executed by the PRC on November 19, 1982.

The PRC Letter of Intent addressed to Neasham states:

> We intend to purchase from Fairchild Weston Systems Inc., 300 Robbins Lane, Syosset, New York 11701, U.S.A. a quantity of long range aerial panoramic photographic system. [sic]

G. Mertins next met with Fairchild executives on Long Island

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[14]Trial Tr. at 377-387.

[15]Trial Ex. "C".

in January, 1983.[16] They again discussed the sale/resale proposal and the markup of Fairchild's price as the method of payment of the Merex commission.

In a memorandum dated February, 1983,[17] Merex summarized the results of the January, 1983 meeting as follows:

> It is intended at present that Merex will submit this offer as Fairchild's representative to the Chinese on Merex paper. The prices of this contract are Fairchild ex factory prices on which we will have to add our addition.

"This contract" referred to in the memorandum was later presented to Merex by Fairchild as a draft contract and was called the "Blue Book." Merex continued to negotiate with the Chinese on the basis of this draft proposal. Mr. Wennmann, a Merex employee conducting the China negotiations, reported in a telex dated June 9, 1983:

> [T]he contract will be back to back except for prices...[18]

A later and final contract proposal between Merex and Fairchild was known as the "Red Book".[19] It consists of forty

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[16]There were two subsequent meetings between G. Mertins and Fairchild executives in New York on April 1, 1983, and in January, 1984. A delegation of PRC military and scientific experts travelled to Long Island to inspect the Fairchild facilities in November, 1983.

[17]Trial Exs. LA, LB; Trial Tr. at 448-451

[18]Trial Ex. U. Stephen Wahl, Secretary and General Counsel to Fairchild testified:

> In a sense, the whole contract was a pass through, in terms that the Merex contract with the Chinese was intended to be essentially a mirror image of this contract with a mark-up for Merex's profit.

Trial Tr. at 1058.

[19]Trial Ex. MM.

eight single spaced typewritten pages and fourteen annexes. The undisputed testimony is that the Red Book was used by the parties in the spring of 1984 in negotiations with the Chinese.[20] The Red Book provided in pertinent part:

> Clause 21.1:
>
> This contract contains all the covenants, stipulations and agreements of the parties. Buyer and seller agree that all prior information, inquiries, seller's general terms of sale etc., not included in this contract are hereby expressly renounced and neither party shall be bound by nor liable for, any statement, representation, promise or agreement not set forth herein.
>
> Clause 21.2:
>
> Any amendments and/or supplements to this contract shall be valid only if made in writing and signed by both parties hereto.
>
> Clause 29.1:
>
> This contract will take effect and bind the parties only after being executed by both contracting parties, and upon payment of the first advance payment of U.S. $13,375,000.00 provided for in Clause 22.

The parties to the contract were identified as Fairchild Weston Systems, Inc. ("Seller") and Merex A.G. ("Buyer").

The testimony of the parties was in direct conflict as to the events during negotiations with the PRC during and after March, 1984. The only factual agreement of the parties is that negotiations pursuant to the terms of the "Red Book" broke off in April, 1984, and that in September, 1984 Fairchild entered into a direct contract of sale for two LORAP camera systems for which

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[20]Helmut Mertins, son of Gerhard Mertins, testified that as of March, 1984, Merex intended to proceed with the sale/resale arrangement based upon the Red Book proposal. Trial Tr. 843-844.

the PRC paid Fairchild $20,300,000.00.

Mr. G. Mertins testified that after his son, Helmut Mertins ("H. Mertins") , graduated from college in 1983, he put him in charge of the LORAP sale. H. Mertins testified that in the latter part of February, 1984, he received the Red Book from Fairchild with a cover letter (Ex. YY). At that time the sale/resale format was used by the parties in negotiating with the PRC. Merex was to negotiate the commercial side of the proposal and Fairchild the technical side. Both sides were to be present during any negotiations.

The Red Book proposal was for five systems at a price of $53,500,000, *ex factory*, from Fairchild to Merex. Prior to this time the PRC was told that the price to them was $54 million (Blue Book).[21] During negotiations, H. Mertins had telexed the PRC that the final price would be increased based on some scope changes to the system.

In January, February, and March of 1984, both G. Mertins and H. Mertins were in Germany. Mr. Lay, vice president of Fairchild, was in China discussing the technical aspects of the proposal.

On March 24, 1984, Mr. Lay sent the following telex to Gerhard and Helmut Mertins.[22]

> I had a meeting with Mr. Zhao Fei this morning. Tomorrow he wants to have technical meeting about pod modification.... Mr. Zhao Fei spoke to me directly on the commercial part and he indicated strongly that he desires your presence here for the commercial discussions. Would appreciate you trying to get over here as fast as possible.

The next day, March 25, Mr. Lay sent the following telex to Fairchild (Pighi and Kraljic):

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[21]Trial Tr. at 832. The BlueBook proposal was that Fairchild would charge Merex $52 million and Merex would mark up the price to the PRC to $54 million.

[22]Trial Ex. GGG; Trial Tr. at 1369.

1. No Red Books from Merex.[23] Sponsor [PRC] is very upset. Please send me five Red Books by DHL immediately. His concern is that they cannot handle Clause 22 [the payment clause].

* * *

4. After we finish technical, sponsor has told me he wants to get into commercial and finish it this trip. I will need our Clause 22 in case sponsor wants to go that way. Joe [Kraljic], you know how to write it for LHP [Mr. Pighi] approval. Send it as soon as possible.[24]

On March 26, 1984, Lay telexed Pighi:[25]

Note: Senior Merex representation is making things very touchy.

Mr. Lay testified that Zhao Fei wanted to move ahead with the negotiations and required a senior Merex person to be present. As of this date he had received no response to his telexes to Merex.[26]

On March 27, 1984 Mr. Lay sent the following telex to Mr. Pighi:[27]

Successfully completed remaining technical matters with Air Force personnel, I hope. I am told we will start commercial discussion day after tomorrow. We have an all court press on

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[23]Mr. Lay testified he sent the technical part of the Red Book to the PRC before he left for China in early March. The reference in the telex was to the commercial part, prepared by Merex.

[24]Trial Ex. HHH; Trial Tr. at 1373-74.

[25]Trial Ex. III; Trial Tr. at 1390.

[26]Trial Tr. at 1390.

[27]Trial Ex. JJJ; Trial Tr. at 1391.

to let's sign Anna. [Anna was the code name the parties used for the proposed sale.] No Merex. Will keep you posted.

On March 30, 1984, Mr. Lay again sent the telex of March 24th to Merex.[28]

On April 1, 1984, plaintiff received the following telex from Mr. Lay:

URGENT/URGENT
URGENT
PLEASE DELIVER ASAP

Bad news. Today I started discussions with sponsor on commercial portion of Anna contract. To my surprise he had a copy of Red Book with all pricing that I had given to you in Germany. This was Fairchild price to Merex. I am at a complete loss why you would give him that book, as I am sure you can appreciate it is going to be extremely difficult to negotiate up, whether it would be five systems or two.

As I have told you before, there is not money in my quote to you to accommodate your commission requirement. Plus all signs appear to me that we are headed for tough price negotiation.

So if you are coming Tuesday to help out in these negotiations, be prepared. Also your clause 22 is anxiously awaited by the sponsor. If you do not plan to come to PRC, please let me know so I can adjust plans.[29]

Mr. Lay testified he sent the telex because Zhao Fei was very emphatic that he wanted to deal with Mr. G. Mertins.

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[28]Trial Ex. 35; Trial Tr. at 1392-93.

[29]Trial Ex. 83; Trial Ex. MMM; Trial Tr. at 1395-96. H. Mertins testified that he canvassed his employees and telexed back that no prices were transmitted by Merex to the buyer. Mr. Lay, however, testified that Mr. Bucholz of Merex admitted to giving the Red Book to the Chinese. Trial Tr. at 1397. Bucholz did not testify.

> On April 4, 1984, a telex was sent from Wahl to Lay. There are a few changes that should be made in the RedBook to reflect contract directly between Fairchild/PRC.
>
> Finally price is reflected below. Enclose, and clause 22 includes only Lachmann.[30]

Mr. H. Mertins arrived in China on April 5th and met with Mr. Lay on the 6th. He testified that at that meeting Lay told him that the quantity was now reduced from five to two systems. He further stated that financing was no longer required and that Fairchild and Merex would sign a contract with the PRC. H. Mertins testified:

> I asked Mr. Lay how we were to be paid, and he said...Merex A.G. would receive 8 percent commission payment upon the sale of the systems to the Chinese, and... Mr. Lay and I also further agreed that if it becomes necessary, that this payment could be reduced to 6 per cent, if necessary, price negotiations required them.... I agreed.
>
> * * *
>
> The sale/resale format would be dropped...Fairchild would negotiate directly with China [and] Merex would be informed by Fairchild when it came time to sign the contract so that we would come to China and jointly sign the contract with Fairchild.[31]

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[30]Mr. Lay testified that Merex was not included in the newly drafted Clause 22 because there was no relationship with Merex other than that of manufacturer and distributor, and when this relationship eroded there was no need to consider any contingency. Trial Tr. at 1065. Mr. Wahl testified that he sent the telex because Mr. Lay was upset and asked for a backup Clause 22 because the Merex organization had not come to China to negotiate. Trial Tr. at 1397-1404, 1406.

[31]Trial Tr. at 786-88.

This Court does not credit this testimony.

After this discussion with Mr. Lay, H. Mertins later went to a room where the negotiations were taking place. He testified that Mr. Neasham barred the door and told him Merex was no longer needed in the negotiations. H. Mertins withdrew and returned to Germany.

Neasham and Lay testified that Fairchild became involved in this project because it relied on the financial ability of G. Mertins as a successful international trader and his apparent good relations with Zhao Fei. Lay became concerned when G. Mertins absented himself from the contract negotiations in China. After he sent the urgent telexes to Merex requesting G. Mertins' presence, he testified:

> Mr. Bucholz [an employee of Merex] came to me and informed me that Mr. Helmut Mertins was coming to China, and my reaction to Mr. Bucholz was: I am very disappointed. We need Mr. G.G. Mertins in China, and there's no way that young Mr. Helmut Mertins is going to be able to handle the problem we are in right now. It is Mr. G.G. Mertins that has the rapport, and I was very upset with the message I had received, and I told him he could pass that information back to Merex and he could possibly save Helmut a trip. And he informed me that Helmut was really coming on some other business also.[32]

Mr. Lay testified that the contract negotiations collapsed. The PRC delegation said they were interested in the LORAP cameras but had no money to pay for them. Lay returned to New York.

The evidence disclosed that after Lay returned home, Fairchild maintained contact with the PRC. Lay testified that in August, 1983, Zhao Fei contacted him and told him to return to the PRC, that they had the money for two LORAP systems.

Mr. Lay testified that he returned to the PRC and negotiated a direct sale of two systems from Fairchild to the PRC for a price of $20,300,000. The contract was signed in September, 1984.

H. Mertins testified that he waited to hear about the

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[32]Trial Tr. at 1399.

negotiations, and in November, 1984 he telexed Norinco as to the status. Exhibit 38 is the telex he received in reply:

"Anna Project was signed by Fairchild."

The witness then communicated with Fairchild and requested payment. Fairchild responded that Merex had a distributorship and could not expect to be paid.

At the close of plaintiff's case, defendant made a Fed. R. Civ. P. 50 motion. On oral argument, the Court could not obtain a straight answer from plaintiff's counsel as to the contract theory of his First Claim. Plaintiff's counsel argued that G. Mertins relied on the oral promise made by Neasham in Germany in August, 1982. He contended that German law was applicable to the enforceability of the oral contract.

In the alternative, plaintiff's counsel argued that when G. Mertins went to Fairchild headquarters in September, 1982 and was informed by Fairchild executives that the only way the defendant would proceed with the sale was by a back to back sale/resale agreement, plaintiff informed Fairchild that the PRC would never accept such an arrangement. Plaintiff's counsel contended that plaintiff accepted defendant's sale/resale proposal only as a mechanism to get the deal done, and at no time did Merex accept the sale/resale arrangement as a replacement for the alleged oral promise.

Defendant argued that as soon as Fairchild was informed of the Neasham/Mertins conversations, G. Mertins was invited to Fairchild's headquarters and was told that the only terms of doing business were through back to back contracts. Defendant contended that G. Mertins accepted this proposal in his October 6, 1982 letter to Fairchild, and subsequent negotiations between the parties were pursuant to this mutual understanding.

Defense counsel argued that the oral contract plaintiff alleged was unenforceable in New York State under the Statute of Frauds. Defendant moved for dismissal of the entire case.

RULINGS OF LAW

I.

Before reaching the substance of this case, the Court must consider plaintiff's motion for recusal. The Court finds that the recusal motion is woefully inadequate. Fairchild identified three independent and adequate grounds supporting this conclusion:

> (A) Merex's allegations of judicial misconduct during trial are insufficient as a matter of law to warrant recusal; (B) Merex has not carried its burden of establishing that [this Court] acted with bias; and (C) Merex has not demonstrated that any alleged animosity on [this Court's] part was directed against Merex rather than against Mr. O'Callaghan.

Defendant's Memorandum at 4. Fairchild's argument amply demonstrates the shortcomings of plaintiff's motion.

II.

Choice of Law

Oral Contract

Merex argued that the oral commission agreement in Germany between G. Mertins and Neasham in August, 1982, is governed by German law and is enforceable in New York courts. He alleged that: the contract negotiations took place in Germany between Neasham and G. Mertins; plaintiff performed in Germany where his business is located; and German law would recognize an oral brokerage contract.

Fairchild argued that: the defendant was located in New York; the goods in question were manufactured and shipped from New York; the key meetings between the parties took place in New York; and the plaintiff chose New York as the forum for the litigation.

Under this forum's conflict rule, New York courts would apply the 'paramount interest' test, *Hutner v. Greene*, 734 F.2d 896 (2d Cir. 1984), in choosing the applicable law of decision in this case. In *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 382, 300 N.Y.S.2d 817, 825, 248 N.E.2d 576, 581 (1969), the New York Court of Appeals defined the test:

> [T]he law of the jurisdiction having the greatest interest in the litigation will be applied and the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.

(citing *Miller v. Miller*, 22 N.Y.2d 12, 15-16, 290 N.Y.S.2d 734, 737, 237 N.E.2d 877, 879 (1968)).

The law in conflict in this case is the law of Germany which would recognize an oral brokerage contract, and the law of New York (General Obligations Law § 5-701 (a) (10) -- Statute of Frauds) which does not.

The legislative history of the Statute of Frauds reveals that the New York legislature was concerned that courts were clogged with oral brokerage contract cases which all too often degenerated into swearing contests. In order to protect New York courts from what was perceived to be widespread perjury, the legislature required that such contracts, in order to be enforceable in New York courts, be in writing subscribed by the party to be charged. **See** *Intercontinental Planning Ltd. v. Daystrom*, 24 N.Y.2d at 382-83, 300 N.Y.S.2d at 825, 248 N. E.2d at 581; *William J. Conlon & Sons., Inc. v. Wanamaker*, 583 F.Supp. 212 (E.D.N.Y. 1984). New York's policy of protecting its residents from unfounded finder's fee claims is clear whereas Germany's interest in protecting the reasonable expectations of its residents is much less apparent. **See** *Denny v. American Tobacco Co.*, 308 F.Supp. 219, 223 (N.D. Cal. 1970) (applying similar reasoning to the choice between New York and California law).

The essence of the business relationship which plaintiff alleged in its contract claim was that Merex was to provide Fairchild an entrance into the markets of the PRC and provide the "know-who" and "know-how" in negotiating a business opportunity, i.e., the sale of LORAP camera systems. This relationship is clearly a "business opportunity" under N.Y. General Obligations Law § 5-701(a)(10). *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 267, 401 N.Y.S.2d 176, 181, 372 N.E.2d 12, 16 (1977); **see also** *Seven Star Shoe Co. v. Strictly Goodies, Inc.*, 628 F.Supp. 1237, 1240 (S.D.N.Y. 1986).

Under the rule of *Intercontinental Planning*, where the parties negotiated key provisions in this jurisdiction, the defendant resided in this state, and the case was brought here, there are sufficient

contacts with New York to give New York a substantial interest in applying its policy. New York Courts would rule that a business broker's claim for commission pursuant to an oral contract would be unenforceable in New York courts. *Minichiello v. Royal Business Funds Corp.*, 18 N.Y.2d 521, 526-27, 277 N.Y.S.2d 268, 271-72, 223 N.E.2d 793, 795-96 (1966), **cert. denied**, 389 U.S. 820 (1967).

This Court granted the defendant's Rule 50 motion and dismissed the First Claim insofar as plaintiff relied upon an oral commission contract.

III.

The Crabtree-Doctrine

Written Contract

After this Court's ruling that the alleged oral contract would not be enforceable under the New York Statute of Frauds, plaintiff argued, in the alternative, that there were sufficient writings found in defendant's internal documents which, when read together, satisfied the Statute under the holding of *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E.2d 551 (1953). Plaintiff's counsel has spilled much ink over the issue of the admissibility and relevance of Fairchild's internal files, whether called "Sales Inquiry Files," "Work Authorization Files," or "Pricing Files" in order to satisfy the *Crabtree* doctrine.

Plaintiff's counsel was authorized, after defendant moved earlier in the litigation for summary judgment, to conduct discovery on the limited issue of whether there was a sufficient writing subscribed by defendant to support the claimed oral commission agreement. In response to plaintiff's demands, defendant furnished hundreds of documents from its internal accounting files.

An examination of those files revealed that in calculating the cost of the proposed deal, the pricing files included such statements as:

(1) *Current agreement with Merex*:

> We quoted $52 Mill. Merex quoted $54 Mill. We will accept $50 Million and Merex gets its differential of $4 Million or 8% commission.
>
> Merex will finance us for the additional funding we need (Max of $11 Million) and absorb the interest cost (approximately $1 Million out of its commission -- (equal) to Lachmann 2%, so Merex realizes 6%.[33]
>
> L.H. Pighi is looking to reduce the total commission received by Merex and Lachmann to 13% combined. Therefore if you take the price of $43,200.00 and add the 13% 6,500.00
> $49,700.00 we will break
> 50,000.00[34]

From these examples, plaintiff argued that it is implicit through projections and computations by Fairchild's employees that Fairchild recognized that Merex was entitled to be compensated on a commission basis, and that therefore these computations are sufficient memoranda under *Crabtree* to prove that the commission was payable on a direct sale to the PRC.

Plaintiff also argued that in statements made by defendant's officers and employees during their depositions, they had referred to "commission to Merex" in their internal files, and thereby supported his claim. However, a fair reading of the deposition testimony discloses that the phrase "commission to Merex" was used in the context of negotiating the ongoing sale/resale format.[35]

Under New York law, plaintiff may not use parol evidence to establish any term of the alleged agreement. The internal

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[33]Undated document in the files of Thomas Egan, former controller of Fairchild. Trial Tr. at 1089-90.

[34]Memo to Chris Lay dated September 15, 1983.

[35]Trial Tr. at 1089-1092.

Fairchild documents themselves[36] must be sufficient, as a matter of law, to prove the oral contract alleged, *i.e.*, that defendant promised to pay plaintiff a commission if defendant made a direct sale of the LORAP cameras to the PRC. *Bazak Int'l Corp. v. Mast Indus., Inc.*, 73 N.Y.2d 113, 538 N.Y.S.2d 503, 535 N.E.2d 633 (1989). In *Bazak*, Judge Kaye, writing for the Court, stated:

> Parol evidence, even in affidavit form, is immaterial to the threshold issue whether the documents are sufficient on their face to satisfy the Statute of Frauds. Consideration of parol evidence in assessing the adequacy of a writing for Statute of Frauds purposes would otherwise undermine the very reason for a Statute of Frauds in the first instance. That issue must be determined from the documents themselves, as a matter of law (*see*, *Scheck v. Francis*, 26 N.Y.2d 466, 472, 311 N.Y.S.2d 841, 260 N.E.2d 493). Accordingly, the trial court erred in ruling that the Statute of Frauds issue should be determined as a matter of fact at trial, and to the extent that plaintiff's arguments are based on parol evidence set forth in Bazak's affidavits, we disregard them.

73 N.Y.2d at 118, 538 N.Y.S.2d at 505, 535 N.E.2d at 635.

The documents primarily relied on by plaintiff in the instant case were the internal files of defendant prepared by accountants, engineers, and other employees of the defendant. These files were work sheets setting forth Fairchild's estimates of the pricing of the LORAP system. Mr. Pighi testified that he would review the documents, and if he thought the price was adequate for the work involved, he would approve them. He had the last word on price.[37] None of the employees generating these documents, including Mr.Egan, the comptroller, had the authority to bind the company to anything contained in those files. Nowhere in any of those files is there a

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[36]The contract proposals referred to earlier as the Red Book and Blue Book were never signed by either party.

[37]Trial Tr. at 1534.

single paper evidencing the terms of the oral contract alleged, nor is there a single document subscribed by Mr. Pighi, the President of Fairchild, or his duly authorized agent supporting plaintiff's claim. Nor were the file references -- "commission to Merex" -- subscribed by the makers of those files with the intent to authenticate such statement as a contractual commitment to pay a commission to Merex on any sale to the PRC. Rather, the phrase was used to describe a component in developing a tentative pricing budget.[38] *Scheck v. Francis*, 26 N.Y.2d 466, 311 N.Y.S.2d 841, 260 N.E.2d 493 (1970) ; *see also Dorman v. Cohen*, 413 N.Y.S.2d 377, 379 (N.Y. App. Div. 1979) ("[T]he memorandum relied on by plaintiffs establishes at most a contract materially different from the contract which forms the basis of plaintiffs' claim...11).

It is undisputed on this record that the Blue Book, late revised and called the Red Book, was a forty-eight page single spaced typewritten document with fourteen annexes which provided that Fairchild would sell the camera systems to Merex, and that Merex would add a sum of money to the Fairchild price for its commissions and sell the camera systems to the PRC for the enhanced figure. The Blue Book and the Red Book provided:

> This contract will take effect and bind the parties only after being executed by both contracting parties, and upon payment of the first advance....

It is equally undisputed on this record that plaintiff and defendant negotiated with the PRC in accordance with the provisions of the Blue Book/Red Book proposed contracts.

In light of the uncontested negotiating posture of the parties from the autumn of 1982 through March of 1984, it is counter-intuitive to suggest that the internal documents of Fairchild -- compiled by scientists, cost accountants, pricing specialists and others for the purpose of Fairchild's internal cost controls in

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[38]This Court examined *in camera* all of the offered Fairchild documents and did not find a single one which states Fairchild was to pay Merex a commission on a direct sale to the PRC. Trial Tr. at 1613-1668.

developing a product to meet its obligations under the proposed executory contracts -- evidence an intent that Fairchild be bound to an alleged oral agreement decidedly different from the contract proposal at hand.

It does not aid plaintiff to show that defendant used the words "commission to Merex" on its pricing sheets during development of the sale/resale agreement. The words "commission", "differential" or "mark-up" used to express plaintiff's expected compensation in the context of the negotiations is not proof of the oral promise plaintiff asserts. These words alone or in combination, even devoid of their context, do not satisfy as
a matter of law the *Crabtree* standard in that they do not exemplify an entire contract with reasonable definitiveness and certainty sufficient to recompense Merex if Fairchild sold the camera systems directly to the PRC.

Plaintiff failed to prove a written contract to pay Merex a commission on a direct sale to the PRC under the standard of *Crabtree*. The written contract claim alleged in the First Claim was dismissed as a matter of law.

IV.

Quantum Meruit

This Court also dismissed the second claim, which was based on quantum meruit. In so doing, the Court relied upon *Minichiello v. Royal Business Funds Corp.*, 18 N.Y.2d 521, 277 N.Y.S.2d 268, 2 23 N.E.2d 793 (1966), **cert. denied**, 389 U.S. 820 (1967), in which Judge Keating applied the Statute of Frauds to a business broker plaintiff who sought to recover commissions in quantum meruit. The plaintiff broker had no written evidence of his contract. The Court, in dismissing the claim, stated:

> [The purpose of the Statute of Frauds] is to make clear that the contracts required to be evidenced by writing include a contract or agreement for the compensation of a business broker for acting as a "finder", "originator" or "introducer," or for assisting in the negotiation or consummation of the

transaction, and that the requirement cannot be avoided by an action for compensation in quantum meruit.

18 N.Y.2d at 525, 277 N.Y.S.2d at 270-71, 223 N.E.2d at 795 (citing N.Y.Legis.Doc., 1964, No. 65[F]).

V.

Promissory Estoppel

The plaintiff in the instant case requested the Court to charge the jury under the doctrine of *Philo Smith & Co. v. USLIFE Corp.*, 554 F.2d 34 (2d Cir. 1977), which establishes the possibility of, and requirements for, a claim of promissory estoppel.

In support of its claim of promissory estoppel plaintiff argued that it performed at all times pursuant to the oral commission promise of Neasham to Merex made in Germany in August of 1982. Plaintiff dismissed the significance of contemporaneously made written evidence of its acceptance o Fairchild's counterproposal[39] by arguing that the sale/resale arrangement was only a mechanism to get the deal done and at

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[39](1) The October 6, 1982 letter of Mertins to Lay [Trial Exhibit "C"] accepting the arrangement discussed by the parties at Fairchild headquarters in September, 1982.

(2) The Merex document of January 1983 [Trial Exhibit "L"] stating :

It is intended at present that Merex will submit this offer as Fairchild's representative to the Chinese on Merex paper. The prices of this contract are Fairchild ex-factory prices on which we will add our addition.

(3) The telex of Mr. Wennman, a Merex employee conducting the PRC negotiations for Merex, dated June 9, 1983 stating:

[T]he contract will be back to back except for prices.....

(4) The uncontroverted testimony on both sides that the parties negotiated among themselves and with the PRC until April, 1984 pursuant to the terms of the Red Book/Blue Book proposals.

no time was it accepted by plaintiff as a replacement of the underlying alleged oral promise.[40]

The Court charged the jury that in order to find for the plaintiff it must be convinced by a preponderance of the credible evidence that:

(1) a clear and unambiguous promise was made to plaintiff;

(2) plaintiff relied on the promise alleged;

(3) the performance of plaintiff was unequivocally referable to the promise alleged; and

(4) plaintiff sustained injury as a result of its reliance.

The Court further charged the jury that loss of profits was an insufficient injury to invoke the doctrine of equitable estoppel.

i.

A Clear and Unambiguous Promise

After so many pages of this opinion, it seems rhetorical to state again that the defendant in this case is Fairchild. The contract plaintiff alleged was an asserted oral agreement between G. Mertins on behalf of Merex and Neasham on behalf of Fairchild.

Because the promise here, if any, was made by Neasham, plaintiff must show not only that the promise was clear and unambiguous, but that Neasham had authority to bind Fairchild. Fairchild's liability can only be predicated upon one of three theories: *first*, that Fairchild actually authorized Neasham to make the oral contract; *second*, that Fairchild clothed Neasham with apparent authority to make the oral contract; or *third*, that after Fairchild became aware of the terms of the oral contract, it ratified the contract. The burden of proof is upon plaintiff.

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[40]Trial Tr. at 1195-1225; *see also* Plaintiff's argument on summation.

A. **Actual Authority**

The only direct evidence in this case as to Neasham's actual authority is Neasham's testimony that he informed G. Mertins that he had no authority to bind the company, and the testimony of Pighi and Lay that Neasham, as a sales representative, had no authority to make a contract for commissions.

G. Mertins testified he "asked Neasham what was his authority." Neasham replied that Fairchild is a generous company. When G. Mertins informed Neasham that his practice is to receive a ten percent commission, G. Mertins testified that Neasham agreed. "We confirmed our agreement with [sic] shake hand."[41] On the record, this Court holds there is an absence of any proof, much less proof by a preponderance of the evidence, that Neasham had actual authority to bind Fairchild to an oral commission contract. *Rodriguez v. Western Union Tel. Co.*, 285 N.Y. 667, 34 N.E.2D 375 (1941).

B. **Apparent Authority**

An agent has apparent authority to bind his principal to a contract with a third party when the third party relies on manifestations of the agent's authority induced by the principal. *Restatement (Second) of Agency* § 125, at 319.

The issue of the apparent authority of Neasham to bind Fairchild to the alleged oral contract does not require lengthy comment in light of the leading cases on this point by the New York Court of Appeals. In *Hallock v. New York*, 64 N.Y.2d 224, 231, 485 N.Y.S.2d 510, 513, 474 N.E.2d 1178, 1181 (1984), the Court stated:

> Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority.

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[41]Trial Tr. at 343.

In *Ford v. Unity Hospital*, 32 N.Y.2d 464, 473, 346 N.Y.S.2d 238, 244, 299 N.E.2d 659, 664 (1973) (citations omitted), the Court stated:

> An agent's power to bind his principal is coextensive with the principal's grant of authority. One who deals with an agent does so at his peril, and must make the necessary effort to discover the actual scope of authority.... [T]he existence of "apparent authority" depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal - not the agent.

This record is devoid of any fact showing that Merex relied upon any misrepresentation of Fairchild, the principal. Rather, the overwhelming evidence is to the contrary, as discussed *infra*.

C. **Ratification**

"It is a well-established rule..... that the principal does not have a duty to perform, nor is he liable upon a contract which he has not actually or apparently authorized or ratified." 3 N.Y. Jur. 2d *Agency* § 247, at 72 (1980) (citing *Mandeville v. Avery*, 124 N.Y. 376, 26 N.E. 951 (1891); *Acme Kalamein Door & Sash Co. v. Union Dime Sav. Bank*, 10 N.Y.S.2d 908 (N.Y. App. Term 1939); *Beals v. Allen*, 18 Johns. 363 (1820); Restatement (Second) of Agency § 182 (1958)).

A principal can become bound by unauthorized acts through ratification, and ratification can occur by silence. "[W]hen an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility thereof." 2 N.Y. Jur. 2d *Agency* § 175, at 599 (1979) (citing *Merritt v. Bissell*, 155 N.Y. 396, 50 N.E.280

(1898); *Harvey v. F.W. Dodge Corp.*, 8 N.Y.S.2d 935 (1938)).[42] The principal's duty, however, arises only when the principal has "knowledge of the act and opportunity to dissent or repudiate." *Id.* § 174, at 598.[43]

The undisputed evidence shows that in September, 1982, Mr. G. Mertins and his assistants went to Fairchild's headquarters in Syosset, Long Island, and discussed a mutually appropriate business arrangement. Mr. G. Mertins met with Mr. Louis Pighi, Fairchild's president and Mr. Chris Lay, Fairchild's vice president.

Mr. G. Mertins testified that on his visit to Syosset in the autumn of 1982, he and Mr. Pighi discussed the sale/resale arrangement. Construed most favorably to G. Mertins, his testimony was that he told Mr. Pighi that the arrangement was impossible and that he, G. Mertins, rejected the distributor contract in favor of the alleged oral contract.[44] This testimony is incredible in light of G. Mertins' testimony on cross-examination.[45] The Court finds as a matter of fact that G.

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[42]*See also* 3 Am. Jur. 2d *Agency* § 197, at 700 (1986) ("[A] principal, after receiving information that an act has been done without actual or apparent authority by one purporting to act as his agent on his behalf, is not bound by that act under the law of agency unless he ratifies the act; but he may and must elect to repudiate or ratify such act promptly or at least within a reasonable time."); 3 C.J.S. *Agency* § 402, at 240 (1973) ("It is the right and duty of a principal promptly to repudiate the unauthorized acts of his agent which do not meet with his approval and which he does not desire to approve."); 3 C.J.S. *Agency* § 70, at 657 (1972) ("Where one without authority purports to act o behalf of a principal, the principal ordinarily has an election either to repudiate or to ratify the unauthorized transaction.").

[43]*See also* 3 C.J.S. *Agency* § 402, at 241 (1973) ("A principal must repudiate the unauthorized act of his agent within reasonable time following knowledge of such acts...").

[44]Trial Tr. at 373-74.

[45]Trial Tr. at 439-60. G. Mertins conceded the authenticity of numerous items of correspondence and memoranda, both before an after his meeting with Pighi, in which the dealings between the parties were discussed in terms of a sale/resale distributorship rather than a commission on a direct sale. Based on

Mertins, during his visit to Syosset in the autumn of 1982, did not press any claim for proceeding on the basis of the alleged oral contract.

If G. Mertins believed the August, 1982 Neasham contract was binding upon the principal, Fairchild, he was under an affirmative duty to reject the Fairchild sale/resale proposal, not because he thought it was impossible, but because he believed he already had a binding agreement to receive a ten percent commission just for introducing Fairchild to the PRC market. A person who deals with an agent has a duty to determine the scope of the agent's authority, *Ford*, 32 N.Y.2d at 473, 346 N.Y.S.2d at 244, 299 N.E.2d at 664, while a principal's duty to ratify or renounce the act of his agent arises only when the principal has knowledge of the act and is given an opportunity to accept or repudiate it. 2 N.Y. Jur.2d *Agency* § 174, at 598. G. Mertins remained silent when presented with the opportunity to discover the scope of Neasham's authority -- and thus the reliability of the representations Mertins claims to have relied upon. At the same time, G. Mertins did not present Fairchild with the opportunity to adopt or ratify the alleged Neasham agreement, although if he had, Fairchild's pursuit of a sale/resale agreement would prevent this Court from finding ratification of the alleged oral commission agreement anyway. Plaintiff, not Fairchild, failed in his duties.

It is to be noted that at the time of the September, 1982 meeting at Fairchild headquarters, neither plaintiff nor defendant had performed any act or incurred an expense. Only after Merex sent its letter to Fairchild on October 6, 1982, accepting the Fairchild September proposal of a sale/resale, did G. Mertins, Lachmann and Neasham travel to the PRC on November 7, 1982. Neasham and Lachmann presented the technical details for the LORAP/MTRF System to the PRC representatives.

After a further meeting between G. Mertins and Fairchild executives at the Fairchild Headquarters in January, 1983, Mere

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this overwhelming unfavorable documentation and G. Mertins' demeanor as a witness, the Court finds that his testimony regarding the position he took in Syosset in the autumn of 1982 carries no credibility.

summarized the agreement reached as follows:

> It is intended at present that Merex will submit this offer as Fairchild's representative to the Chinese on Merex paper. The prices of this contract are Fairchild ex-factory prices on which we will add our addition.

From the foregoing uncontroverted facts, even if one assumes the Neasham/G. Mertins oral agreement in August of 1982, the record supports a finding -- not of ratification by Fairchild -- but of a counteroffer by the principal Fairchild which was accepted by the plaintiff, creating a new and different relationship between the parties. Fairchild was not bound by any oral agreement alleged.

ii.

Plaintiff's Acts Must Have Been in Reliance on the Oral Promise

Plaintiff has failed to meet his burden of proving by a preponderance of credible evidence that he *reasonably* relied upon the oral promise alleged to have been made by Neasham in Germany. *See City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 49 (2d Cir. 1988) ("Yonkers officials were aware of the weakness of their position at the time they contracted, rendering reliance unreasonable."); *Wurmfeld Assocs., P.C. v. Harlem Interfaith Counseling Servs.*, 578 N.Y.S.2d 200, 201 (N.Y. App. Div.) ("[P]laintiffs' services could not have been performed in reasonable reliance..."), *leave to appeal dismissed*, 79 N.Y.2d 1027, 584 N.Y.S.2d 439, 594 N.E.2d 933 (1992).

The alleged oral promise contradicts the terms of an admitted, subsequent, written executory agreement. The credible evidence -- as opposed to plaintiff's unreliable, unsubstantiated and selfserving testimony -- shows that any oral promise was superseded by the parties' later dealings. Indeed, plaintiff did not convincingly establish that the alleged oral agreement was ever discussed with Fairchild after the meeting with Neasham. Reasonable reliance cannot be based upon

wishful thinking, yet nothing more is suggested by the credible evidence here; plaintiff may have preferred a percentage commission all along, but it went ahead with a deal structured in a wholly different manner.

iii.

Plaintiff's Performance Must Be Unequivocally Referable to the Promise Alleged.

Plaintiff has alleged reliance on an oral agreement between G. Mertins and Neasham in Germany in August, 1982.

This Court finds that when Neasham informed Fairchild of the discussions in Germany between G. Mertins and Neasham, Fairchild immediately invited G. Mertins to Long Island where Fairchild told G. Mertins that a sale/resale would be the only basis on which the project could go forward. That meeting took place in September, 1982. On October 6, 1982, Merex wrote Fairchild that Merex accepted the Long Island proposal.

This Court finds that G. Mertins' October 6, 1982 acceptance of Fairchild's Long Island proposal is evidence of the parties' mutual agreement in principal to negotiate a sale/resale to the PRC.

Pursuant to the agreement to negotiate, the record reveal that the parties undertook three relevant activities:

(1) Plaintiff and defendant began discussions of terms for the back-to-back sale/resale which were reduced to the writing known as the Blue Book, later the Red Book.

(2) Mertins and Fairchild representatives went to the PRC on November 7, 1982, to present the technical details of the LORAP system.

(3) Fairchild began preparations for the manufacture of the LORAP camera systems.

There is no dispute between the parties that they negotiate all of the terms in the Red Book and used it as the basis of the negotiations with the PRC. The Red Book expressed the mutual intent of the parties; however it was never executed because the condition precedent -- the Merex sale to the PRC -- never too place.

Where, as in the instant case, plaintiff performs under an alleged oral contract and defendant offers proof of another agreement (the sale/resale proposal) to which plaintiff's acts are equally referable, the finder of fact must be convinced that plaintiff's performance was pursuant to the contract it alleges an not another.

In the instant case, plaintiff did not perform any substantive act until after G. Mertins sent the October 6, 1982 letter to Fairchild accepting the sale/resale proposal. It cannot on this record be said that the preponderance of evidence demonstrated reliance by plaintiff on the oral agreement. *Cunnison v.Richardson Greenshields Sec.*, 485 N.Y.S.2d 272, 276 (N.Y. App. Div. 1985) ("If...an act is equally consistent with an explanation having a basis in other than the alleged oral agreement, the part performance relied upon will not remove the agreement from the bar of the statute of frauds."); *see also American Bartenders School, Inc. v. 105 Madison Co.*, 59 N.Y.2d 716, 463 N.Y.S.2d 424, 450 N.E.2d 230 (1983) ("[T]he doctrine of part performance is inapplicable, inasmuch as the performance is not 'unequivocally referable' to the alleged oral agreement.") ; *Ripple's of Clearview, Inc. v. Le Havre Assocs.*, 452 N.Y.S.2d 447, 449 (N.Y. App. Div.), *appeal denied*, 57 N.Y.2d 609, 456 N.Y.S.2d 1026, 442 N.E.2d 1277 (1982).

This Court finds that overwhelming evidence that plaintiff intended to perform in reliance on the sale/resale proposal and not on the alleged oral agreement of August, 1982 is contained in a letter dated February 27, 1985, after plaintiff learned of the direct sale by defendant to the PRC. The letter was written by G. Mertins to Fairchild's parent corporation. It stated in pertinent part:

> Between Merex and Fairchild Weston Systems Inc. it was agreed to that Merex would buy five photographic

> system from Fairchild Weston for resale to NORINCO..... the three companies going through two contracts instead of one. The business relations between Fairchild Weston Systems, Inc. and Merex were established in distributorship agreement in which Fairchild Weston Systems Inc. appointed Merex as its exclusive distributorship in the People's Republic of China.[46]

Plaintiff's argument that it accepted the sale/resale proposal as a mechanism to get the deal done and not as a substitute for the oral agreement is belied by the record evidence. This Court finds that plaintiff's performance was unequivocally referable to the sale/resale proposal under which plaintiff was to receive a commission by a markup of Fairchild's ex-factory price. Plaintiff has failed to prove that its performance was unequivocally referable to the oral commission agreement alleged.

iv.

Injury
Is This Case a Rare Exception?

Before imposing liability by finding an equitable estoppel, courts look for a high degree of unconscionable behavior on the part of the defendant which makes invocation of the Statute of Frauds itself a fraud. *Philo Smith*, 554 F.2d at 36; *see also American Bartenders*, 59 N.Y.2d 716, 463 N.Y.S.2d 424, 450 N.E.2d 230 ("The purpose of invoking the doctrine (of equitable estoppel] is to prevent the infliction of unconscionable injury and loss upon one who has relied on the promise of another."); *Buddman Distribs., Inc. v. Labatt Inporters, Inc.*, 458 N.Y.S.2d 395, 396-97 (N.Y. App. Div. 1982) (citation omitted) ("The doctrine of promissory estoppel...is 'properly reserved for that limited class of cases where 'the circumstances are such as to render it *unconscionable* to deny' the promise upon which the

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[46]Letter is annexed to Plaintiff's amended complaint as Exhibit 23.

plaintiff has relied.'"). The focus of the court therefore is the conduct of the defendant rather than the loss to the plaintiff.

Plaintiff's claim was that Fairchild acted with fraudulent intent in insisting on the sale/resale format which plaintiff claimed Fairchild knew the PRC would not accept in order to take advantage of G. Mertins' contacts with that country. Plaintiff further argued that during the negotiations of the technical aspects of the Red Book proposal, Fairchild schemed with the PRC to "cut plaintiff out of the deal"[47] and to make a direct sale to the PRC.

The Court finds that the credible evidence in the record simply does not support this version of the facts.

Both plaintiff and defendant testified that their understanding was that both were to be present during negotiations with the PRC. For reasons never explained, G. Mertins did not go to the PRC as he agreed to do when he knew Chris Lay was negotiating the technical aspects of the Red Book proposal. Instead, G. Mertins sent an employee, Helmut Bucholz. When the technical discussions were nearing conclusion, Mr. Lay made repeated efforts by telexes to secure the presence of Mr. G. Mertins for the commercial negotiations. This series of telexes has been quoted earlier in this opinion,[48] but the telex of March 24, 1984, from Lay to Mertins bears repeating:

> I had a meeting with Mr. Zhao Fei this morning. Tomorrow he wants to have technical meeting about pod modification.... Mr. Zhao Fei spoke to me directly on the commercial part and he indicated strongly that he desires your presence here for the commercial discussions. Would appreciate you trying to get over here as fast as possible.

Mr. Lay credibly testified to his reaction to the failure of G. Mertins to come to the PRC:

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[47] *See* Plaintiff's argument on summation.

[48] *See supra* pp. 12-14.

> Mr. Bucholz [an employee of Merex] came to me and informed me that Mr. Helmut Mertins was coming to China, and my reaction to Mr. Bucholz was: I am very disappointed. We need Mr. G.G. Mertins in China, and there's no way that young Mr. Helmut Mertins is going to be able to handle the problem we are in right now. It is Mr. G. Mertins that has the rapport, and I was very upset with the message I had received, and I told him he could pass that information back to Merex, and he could possibly save Helmut a trip. And he informed me that Helmut was really coming on some other business also.

The Court finds, based on the evidence in the record, that Fairchild, rather than engaging in an unconscionable or fraudulent scheme with the PRC to "cut plaintiff out of the deal," endeavored in good faith to secure the presence of G. Mertins in the PRC to negotiate the commercial aspects of the proposal. Fairchild bargained for the negotiating services of the elder, knowledgeable, and business wise Mertins, not his twenty-five year old son.

Plaintiff has not proven by a preponderance of the credible evidence that the negotiations collapsed in April, 1984 due to an wrongdoing on the part of Fairchild. Plaintiff has not proven the most essential factor of *Philo Smith*, unconscionable conduct part of the defendant which caused him injury.

This Circuit held in *Philo Smith*, 554 F.2d at 36:

> The proof in this case fell well short of that mark. Judge Tenney found that the only substantial injury suffered by the plaintiffs was the loss of a fee from the defendant. However, as Judge Tenney held, and as the quotation from Woolley indicates, this is not the kind of injury contemplated by New York law, for it is solely a result of the non-performance of a void agreement.

In the instant case, there has been no proof of damages other that loss of a fee. This Court charged the jury that such loss was insufficient to invoke the doctrine of promissory estoppel.

This Court has not overlooked the case of *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989).

Mr. G. Mertins absented himself from the negotiations in China, which were a critical part of his responsibility, and Fairchild, by telexes, made him aware of the urgency of his appearance. This Court does not find the defendant negotiated in bad faith; on the contrary, the Court finds plaintiff breached its own negotiating responsibilities.

Although this Court cannot say with a reasonable degree of certainty whether the presence of G. Mertins at the bargaining table would have caused a successful conclusion to the contract negotiations, it can certainly say that his absence constituted a failure to negotiate in good faith on his part, and defendant had an absolute right to rescind its agreement with Merex because of the material breach of that agreement by Mr. G. Mertins. This Court therefore finds that Merex, rather than Fairchild, materially breached the agreement to negotiate in good faith for the sale/resale of the LORAP systems to the PRC. This Court finds that plaintiff has not proven its claim of promissory estoppel by a fair preponderance of the credible evidence and renders a verdict for the defendant on this claim.

Submit Order.

IT IS SO ORDERED.

Dated: New York, New York
December 29, 1992

/Signature
Mary Johnson Lowe
UNITED STATES DISTRICT JUDGE

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW, TO AMEND THE JUDGMENT, AND FOR A NEW TRIAL, DATED OCTOBER 29, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)
ORDER

APPEARANCES:

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New York, New York 10111

BY: ROY A. KLEIN, ESQ.
RONALD W. WEINER, ESQ.

MARY JOHNSON LOWE, U.S.D.J.

Before the Court are Plaintiff's, Merex A.G. ("Plaintiff"), motions for Judgment as a Matter of Law, for Amendment of the Judgment, and for a New Trial pursuant to Rules 50(b), 52(b) and 59, Fed. R. Civ. P. respectively.

Plaintiff commenced this action on August 21, 1985 seeking to recover a commission or fee pursuant to an alleged oral agreement with Defendant, Fairchild Weston Systems, Inc. ("Defendant"), for the sale of Defendant's military aerial surveillance cameras to the People's Republic of China, After dismissal of Plaintiff's breach of contract, quantum meruit and declaratory judgment claims, the only remaining cause of action was a claim of promissory estoppel. The Court informed the parties that the trial would proceed with the jury sitting as an advisory jury. On April 29, 1992 the jury returned a verdict for Plaintiff, Defendant timely moved the Court to render a judgment for Defendant. The Court reserved decision. By Memorandum opinion and order dated December 29, 1992 the Court rendered a verdict for the Defendant finding that Plaintiff, rather than Defendant, materially breached the agreement to negotiate in good faith for the sale of Defendant's camera systems and Plaintiff had not proven its claim of promissory estoppel by a fair preponderance of the evidence. Judgment upon the verdict was entered on January 28, 1993.

These motions stem from the judgment rendered in favor of the Defendant. For the reasons set forth below, all of the Plaintiff's motions are denied.

Civil Rule 3(b) of the United States District Court for the Southern District of New York states in part: "[u]pon any motion, the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion..." Rule 3(b) further states: [f]ailure to comply may be deemed sufficient cause for the denial of the motion... " Additionally, Rule 7(b)(1) Fed. R. Civ. P., provides that a motion "[S)hall state with particularity the grounds therefor..." Based on these standards, Plaintiff's motions and supporting memorandum are clearly without merit.

While Plaintiff aptly quotes provisions of Rules 50, 52 and 59 of the Federal Rules of Civil Procedure, Plaintiff's moving papers contain no explanation or application of the law to the facts of this

case. Considering the extraordinary relief sought, Plaintiff effectively makes no argument and essentially asks the Court to apply the circumstances to the rules of law. This is evidenced in Plaintiff's moving papers and memorandum which articulate no particular grounds demonstrating that Plaintiff is entitled to relief. Instead, Plaintiff offers vague grounds such as "grounded upon the facts and circumstances" and "grounded upon the record in this action" without specifying any relevant argument addressing the facts and the law. In short, Plaintiff's moving papers lack the specificity of grounds and authorities necessary under Rule 7(b)(1) and Civil Rule 3(b).

Although the particularity standard of Rule 7(b)(1) is not rigid and only reasonable specification is necessary, "[B]arren assertions such as 'contrary to law' and 'not sustained by the evidence' are insufficient to circumvent compliance" with Rule 7(b)(1). 2A James WM. Moore, *Moore's Federal Practice* ¶ 7.05. Thus, even Plaintiff's Reply Affirmation in Support of the motions is inadequate. Only in the Reply Affirmation does Plaintiff attempt to state any reasons as to why the requested relief should be granted. However, Plaintiff's contentions such as "omits reference to numerous matters," "unfairly controlled testimony" and "insufficiency of the evidence" both in the supporting memorandum and Reply Affirmation do not fulfill the particularity criteria required in a motion and in effect amount to barren assertions.

Assuming *arguendo*, that specific grounds have been articulated by Plaintiff in its Reply Affirmation, nevertheless the stated grounds do not satisfy the appropriate legal standards for granting of the motions. A post-judgment motion under Rule 50 cannot be granted where the moving party fails to seek such relief at the close of all the evidence. *See American Protein Corporation v. AB Volvo*, 844 F,2d 56, 61-62 (2d Cir. 1988), *cert. denied*, 488 U.S. 852 (1988) (decided under the former Rule 50). Only in limited circumstances, inapplicable here, such as where the court indicates that renewal of the motion is unnecessary to preserve the right to make the motion later, may a party be excused from this prerequisite of moving for judgment at the close of all the evidence. *Ebker v. Tan Jay Int'l., Ltd.*, 739 F.2d 812 (2d Cir, 1984), *cert. denied*, 112 U.S. 161 (1991). Plaintiff did not make such a motion at the close of trial nor does Plaintiff now contend

that it made the motion for judgment as a matter of law at the close of all the evidence. Therefore, Plaintiff's motion for judgment as a matter of law is denied.

Plaintiff's motion for amendment of the judgment is also denied. Three grounds are recognized to support a Rule 52(b) motion: (1) that the trial court has made a manifest error of fact or law, (2) that there is newly discovered evidence, or (3) that there has been a change in the law. *Dow Chemical Pacific Ltd, v. Rascator Maritime S.A.*, 609 F.Supp, 451, 452-53 (S.D.N.Y. 1984), *modified on other grounds*, 782 F.2d 329 (2d Cir. 1986). None of these grounds can be discerned from Plaintiff's moving papers which would warrant an amendment of the Court's judgment. Rather, Plaintiff's moving papers state only vague assertions and conclusory statements such as "insufficiency of the evidence." Furthermore, since the findings of fact of a trial court are entitled to presumptive validity both on appellate review and during proceedings to amend factual findings and judgment, the moving party has a heavy burden to establish factual error sufficiently serious to merit an amendment. *Wallace v. Brown*, 485 F.Supp. 77, 79 (S.D.N.Y. 1979). Plaintiff has not sustained this burden.

Likewise, three bases are recognized in non-jury cases as grounds for granting a new trial: (1) manifest errors of law, (2) manifest errors of fact, and (3) newly discovered evidence, *Geshwind v. Garrick*, 738 F.Supp. 792, 793 (S.D.N.Y. 1990). Plaintiff's motions and accompanying papers do not indicate any of these grounds. Additionally, the moving party bears the burden of showing that it is entitled to a new trial. *Metromedia Company v. Fugazy*, 753 F.Supp. 93, 96 (S.D.N.Y. 1990). Plaintiff does not identify any errors but only argues that the Court's rulings were "unfair." Mere disagreement with the Court's findings does not qualify as sufficient grounds for a new trial. *Geshwind*, 738 F.Supp. at 749. Accordingly, Plaintiff is not entitled to a new trial.

CONCLUSION

For the foregoing reasons, Plaintiff's motions for Judgment as a Matter of Law, to Amend the Judgment, and for a New Trial are denied.

It is SO ORDERED.

Dated: New York, New York
October 29, 1993

/Signature
Mary Johnson Lowe
United States District Judge

Copies of this Order to:

DANIEL J. O'CALLAGHAN, ESQ.
17 Battery Place
New York, New York 10004

ARENT FOX KINTNER PLOTKIN & KAHN
Roy A. Klein, Esq. and Ronald W. Weiner, Esq.
45 Rockefeller Plaza
New York, New York 10111

APPENDIX C - DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 14, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1817 -- August Term, 1993

(Argued: June 14, 1993 Decided: July 14, 1994)

Docket No. 93-9286

MEREX A.G.; MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs-Appellants,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant-Appellee.

Before:

McLAUGHLIN and JACOBS, *Circuit Judges*,
and WEINSTEIN, *Senior District Judge*.*

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* Honorable Jack B. Weinstein, of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Lowe, J.) dismissing plaintiff's complaint seeking damages under an oral commission agreement. Plaintiff-appellant argues that the trial court erred when, after plaintiff rested, it declared that the jury verdict on its promissory estoppel claim would only be advisory under Fed. R. Civ. P. 39 (c).

Affirmed.

DANIEL J. O'CALLAGHAN, New York, NY,
for Plaintiffs-Appellants.

ROY A. KLEIN, Old Bethpage, NY,
for Defendant-Appellee.

MCLAUGHLIN, *Circuit Judge*:

Merex A.G. ("Merex") appeals from a judgment entered in the United States District Court for the Southern District of New York (Mary Johnson Lowe, *Judge*) dismissing its complaint seeking damages under an oral commission agreement. Merex argues, among other things, that the district court abused its discretion by declaring the jury verdict on its promissory estoppel claim advisory only, under Federal Rule 39(c), and by waiting until Merex rested its case before announcing this ruling.

We hold that the Seventh Amendment did not guarantee Merex the right to a jury trial on its promissory estoppel claim. We also hold that the district court acted within its discretion when it declared the jury advisory. Accordingly, we affirm.

BACKGROUND

In the early 1980s, defendant Fairchild Weston Systems, Inc. ("Fairchild") planned to sell several multi-million dollar military surveillance systems to the Peoples' Republic of China (the "PRC"). Lacking the necessary Asian connections, Fairchild

engaged Merex, a German brokerage company, to introduce Fairchild to representatives of the PRC and to broker the sale. The dispute now centers on how Fairchild was to compensate Merex for its middleman services.

Merex initially offered to work for a commission, calculated as a percentage of the sale price. According to Merex's president, Gerhard Mertins, a representative of Fairchild orally promised Mertins in the summer of 1982 that Fairchild would pay Merex an eight-percent (8%) commission on Fairchild's direct sale to the PRC.

Merex's proposed commission arrangement was not acceptable to Fairchild's executives, however; apparently, they were reluctant to deal directly with the PRC. Fairchild insisted that the parties structure the deal in a sale/resale format so that Fairchild would sell five systems to Merex, and Merex would then resell the systems (as Fairchild's exclusive distributor) to the PRC. Merex would thus assume the risk of collecting payment from the PRC, and would be compensated by charging the PRC a mark-up on the resale.

Negotiations among the three parties under this sale/resale format broke down in April, 1984. Shortly thereafter, Fairchild renewed the negotiations with the PRC-without Merex. Five months later, despite its earlier misgivings about dealing with the PRC, Fairchild consummated a direct sale to the PRC of two surveillance systems. The deal, of course, did not include Merex. When Fairchild refused to pay Merex for its prior services, Merex sued Fairchild in the district court, alleging an oral promise by Fairchild to pay Merex a commission on any direct sale to the PRC. Merex's complaint sought damages under theories of breach of contract, quantum meruit, and promissory estoppel. The complaint also sought a declaration of Merex's rights under the alleged commission agreement. Merex demanded a jury trial on all issues.

The jury trial began on April 13, 1992. Following Merex's case-in-chief, Judge Lowe granted, in part, Fairchild's motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50(a). Judge Lowe found that, without a writing, both Merex's claims for breach of contract and quantum meruit were barred by New York's Statute of Frauds. ***See Merex A.G. v. Fairchild Weston Systems, Inc.***, 810 F.Supp. 1356 (S.D.N.Y 1993). Judge Lowe

also dismissed Merex's claim for a declaratory judgment, and no issue is made of this. Characterizing the remaining promissory estoppel claim as "equitable," Judge Lowe then ruled that she would let it go to the jury, but only for an advisory verdict. Fed. R. Civ. P. 39(c). *Merex*, 810 F.Supp. at 1358 n.2.

After Fairchild completed its case, the case went to the advisory jury, which returned a verdict in favor of Merex on the promissory estoppel claim. Judge Lowe rejected the jury's advice, however. After issuing findings of fact and conclusions of law, *see* Fed. R. Civ. P. 52(a), the court entered judgment for Fairchild, dismissing Merex's complaint.

Merex now appeals.

DISCUSSION

Merex raises a host of arguments on appeal; we find only one worthy of serious consideration.

Merex challenges the district court's decision to treat the verdict on its promissory estoppel claim as merely advisory. Merex believes that promissory estoppel is a legal claim, not an equitable one, and argues that the Seventh Amendment guaranteed Merex a jury trial on that issue. Alternatively, Merex argues that even if Merex was not entitled to a jury trial as a matter of right, the district court nevertheless abused its discretion under Rule 39(c) by waiting until mid-way through trial before telling the parties that the verdict would not be binding. We address these arguments in turn.

I. *The Seventh Amendment and Promissory Estoppel*

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. As Justice Story explained for the Supreme Court in 1830, the phrase "suits at common law" is not limited to "suits, which the common law recognized among its old and settled proceedings"; rather, the phrase embraces all "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons v. Bedford*, 28

U.S. (3 Pet.) 433, 447 (1830). Thus, "it has long been settled that the right [to a jury trial] extends beyond the common-law forms of action recognized at the time the Seventh Amendment was adopted in 1791. *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (Seventh Amendment entitled plaintiff to jury trial in suit for violation of Title VII of the Civil Rights Act of 1968).

To decide whether the Seventh Amendment's right to a jury trial extends to a cause of action born subsequent to the Amendment's adoption, we apply a twofold, historical analysis: "The standard test is to determine first whether the action would have been deemed legal or equitable in 18th century England, and second whether the remedy sought is legal or equitable in nature. The court must balance the two giving greater weight to the latter." *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323, 1328 (2d Cir. 1993). *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989); *Tull v. United States*, 481 U.S. 412, 417-18 (1987).

A. *The Nature of the Right*

Although "promissory estoppel" *per se* was unknown to the courts of 18th-century England, *see* John D. Calamari and Joseph M. Perillo, *Contracts* § 6-1, at 272 (3d ed. 1987), its modern uses have historical antecedents in both law and equity.

The modern doctrine of promissory estoppel may be invoked in two situations. First, and most traditionally, the doctrine allows for the enforcement of a promise in the absence of bargained-for consideration. *See Restatement (Second) of Contracts* § 90 (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."); *see, e.g., Schmidt v. McKay*, 555 F.2d 30, 36 (2d Cir. 1977). This is known as the theory of detrimental reliance.

Promissory estoppel has also become increasingly available to provide relief to a party where the contract is rendered unenforceable by operation of the Statute of Frauds. *See Restatement (Second) of Contracts* § 139(1) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the

Statute of Frauds if injustice can be avoided only by enforcement of the promise."); *see, e.g., Philo Smith & Co., v. USLIFE Corp.*, 554 F.2d 34, 36 (2d Cir. 1977) (per curiam); *see generally* Jeffrey G. Steinberg, Note, *Promissory Estoppel as a Means of Defeating the Statute of Frauds*, 44 Fordham L. Rev. 114 (1975).

Precedent for the rule that detrimental reliance may render a gratuitous promise enforceable can be found in "the decisions of the courts of common law from the very beginnings of the action for assumpsit." 1A Arthur L. Corbin, *Corbin on Contracts* § 194, at 193 (1963). *See* Ames, *The History of Assumpsit*, 2 Harv. L. Rev. 1, 14 (1888) ("a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request"); *Restatement (Second) of Contracts* § 90 cmt. a ("enforcement of informal contracts in the action of assumpsit rested historically on justifiable reliance on a promise"); *see generally* Calamari & Perillo § 6-2, at 277; *see, e.g., Coggs v. Bernard*, 92 Eng.Rep. 107 (K.B. 1703). This would suggest a legal root for the doctrine.

On the other hand, as its surname suggests, the doctrine of promissory estoppel is a direct descendent of equitable estoppel. *See* Calamari & Perillo § 6-2 at 274, 281; 1 Samuel Williston, *Williston on Contracts* § 140, at 607-09 (3d ed. 1957). Although equitable estoppel was ultimately recognized by the courts of common law, the doctrine was first fashioned in the courts of equity. *See* 2 Fred F. Lawrence, *Equity Jurisprudence* § 1046, at 1132 (1929) ("Jurisdiction of equity courts to prevent fraud by the use of estoppel is a 'very old head of equity.' ") (citation omitted). The most obvious precedents in equity for promissory estoppel were those cases in which the Statute of Frauds precluded enforcement of an oral promise to convey land. It was well established that the Chancellor could grant specific performance of such a contract where the promisee spent money and made improvements to the land in reliance on the oral promise. *See* Joseph Story, *Equity Jurisprudence* § 1054 (1989); Lawrence, *supra* § 799, at 888-89 (1929); *see generally* Benjamin F. Boyer, *Promissory Estoppel: Principle From Precedents: I*, 50 Mich. L. Rev. 639, 655 (1952).

Thus, the protean doctrine of "promissory estoppel" eludes classification as either entirely legal or entirely equitable, and the historical evidence is equivocal. It is clear, however, that both law and equity exert gravitational pulls on the doctrine, and its

application in any particular case depends on the text in which it appears. For example, where a plaintiff sues for contract damages and uses detrimental reliance as a substitute for consideration, the analogy to actions in assumpsit (law) is compelling. By contrast, when the plaintiff uses promissory estoppel to avoid a draconian application of the Statute of Frauds, the pull of equity becomes irresistible.

We believe Merex's invocation of the doctrine more closely resembles the latter than the former. In this case, the alleged commission agreement was certainly supported by adequate consideration, and, consequently, there is no need to rely on notions of detrimental reliance. Merex is seeking to use promissory estoppel to circumvent New York's Statute of Frauds. When promissory estoppel is utilized in this manner, the claim is more equitable than promissory in nature. *See, e.g., Esquire Radio & Elec., Inc. v. Montgomery Ward & Co.*, 804 F-2d 787, 794 (2d Cir. 1986) ("having reneged on its promise to repurchase Esquire's spare parts inventories . . . Ward is equitably estopped from raising the Statute of Frauds").

B. *The Nature of the Remedy*

In its prayer for relief, Merex requested $1,680,000 on its promissory estoppel claim, a sum representing eight percent of the sale price of the two surveillance systems Fairchild sold to the PRC. Thus, Merex sought to recover expectation damages under the alleged oral commission agreement. Because expectation damages for breach of contract are traditionally legal in nature, the pull of law with its attendant right to a jury trial is distinctly felt. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977) ("suits for damages for breach of contract, for example, were suits at common law"); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477 (1962) ("As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.").

A claim for money damages, of course, constitutes "legal" relief, for such relief was "the traditional form of relief offered in the courts of law." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (quoting *Curtis*, 415 U.S. at 196). But this is not always true. *Id.* Restitution damages, for example, and money awarded incidental to the grant of equitable

relief are not legal in nature. *Id.* at 570. Furthermore, money damages may constitute equitable relief where "the court is not awarding damages to which the plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment." *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978) (Friendly, J.) (disgorgement of profits is equitable).

In this case, Merex's equitable theory of liability collides with its claim for legal relief. Specifically, Merex falls back upon the doctrine of promissory estoppel because the Statute of Frauds renders the oral commission agreement unenforceable; Merex believes that to apply the Statute would work a fraud in this case. "Relief in cases within [the Statute of Frauds], therefore, as in all others of this nature, is not predicated upon enforcing the contract in the teeth of the statute, but preventing its use to defeat this ulterior equity. . . . This use of one of equity's favorite weapons, estoppel, to prevent this particular injustice is well established." Lawrence, *supra* § 786, at 876.

In short, plaintiff's reach exceeds its grasp by invoking an equitable theory (estoppel) to give it the legal relief (expectation damages) that is denied to it by the Statute of Frauds. This it may not do. To invoke the power that equity possesses to trump the Statute of Frauds plaintiff must demonstrate "unconscionable" injury, i.e., injury beyond that which flows naturally (expectation damages) from the non-performance of the unenforceable agreement. *See Philo Smith*, 554 F.2d at 36. If successful, the plaintiff is not entitled, as of right, to expectation damages; the court retains the discretion to award relief to avoid "injustice", and can mold that relief "as justice requires." *Restatement (Second) of Contracts* § 139; *see, e.g., Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989) ("Prevailing on a promissory estoppel claim, however, sometimes entitles a party only to its out-of-pocket expenses, rather than to benefit-of-the-bargain damages."); *see generally* Mary E. Becker, *Promissory Estoppel Damages*, 16 Hofstra L. Rev. 131, 147-48 (1987) (observing that there is a "strong case" for awarding restitution relief instead of contract damages where the Statute of Frauds renders the contract unenforceable: "If full expectation damages (or specific performance) were available once there had been reliance, there would be little left of the statutory bar.").

Thus, while we recognize the legal nature of expectation damages generally, we remain unpersuaded that Merex's prayer for money damages outweighs the undeniably equitable nature of the promissory estoppel claim as a whole, particularly where, as here, the measure of damages plaintiff seeks is inappropriate. Accordingly, we hold that Merex's claim is properly regarded as equitable rather than legal and, consequently, that Merex was not entitled to a jury trial on its claim for promissory estoppel. This accords with the weight of authority. *See Nimrod Mktg. (Overseas) Ltd. v. Texas Energy Inv. Corp.*, 769 F.2d 1076, 1080 (5th Cir. 1985) ("Promissory estoppel is an equitable form of action in which equitable rights alone are recognized. Defendants had no right to trial by jury....") (citations omitted), *cert. denied*, 475 U.S. 1047 (1986); *C & K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1141 (Cal. 1978) ("We conclude that the trial court properly treated [promissory estoppel] as equitable in nature, to be tried by the court with or without an advisory jury as the court elected.").

II. *Abuse of Discretion under Rule 39(c)*

Relying exclusively on out-of-circuit authority, Merex alternatively argues that, even if it was not entitled to a jury trial, the trial court committed reversible error by declaring the jury advisory *after* the trial had actually started. We do not read Rule 39(c), or the cases relied upon by Merex, to compel such a conclusion.

Rule 39(c) provides that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury...." After the breach of contract, quantum meruit and declaratory judgment claims were dismissed, the only claim surviving in the case was not "triable of right by a jury." The court "of its own initiative" had the right to try the remaining issue with an advisory jury. Indeed, absent the consent of the parties, it would be highly questionable for a court to submit an equitable issue to an advisory jury for a binding verdict. *See Mallory v. Citizens Utilities Co.*, 342 F.2d 796, 797-98 (2d Cir. 1965) (error to enter judgment upon advisory jury's verdict in equitable action for rescission of contract; court must make independent findings of fact and conclusions of law).

Merex cites *Thompson v. Parkes*, 963 F.2d 885 (6th Cir. 1992), *Bereda v. Pickering Creek Industrial Park, Inc.*, 865 F.2d 49 (3d Cir. 1989), and *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965), for the proposition that a trial court abuses its discretion whenever it declares the jury advisory after the start of trial. Although there are dicta in each case arguably supporting such a broad rule of law, the reasoning of these decisions does not suggest a similar result in this case.

The Sixth Circuit's decision in *Thompson*, for example, is starkly different from our case. There, the trial court declared the jury advisory one week after the jury had returned its verdict. *See Thompson*, 963 F.2d at 887. Reversing, the court proffered at least three reasons why waiting that long constituted an abuse of discretion in that case.

First, the court reasoned that to sanction the practice would permit judges to exercise "veto power" over jury verdicts with which they disagree. *Id.* at 889. Second, the court observed that Rule 39(c) permits the parties to stipulate to a jury trial even if the claims were not triable as of right by a jury. (In that case, both sides had requested a jury trial, and neither side had moved to strike the jury demand or for a directed verdict. *Id.*) Finally, the court believed that fundamental fairness and judicial economy required notice of an advisory jury in advance of trial, so that counsel "may prepare a case appropriate to the trier of fact." *Id.* at 889; *see also Hildebrand v. Board of Trustees*, 607 F.2d 705, 710 (6th Cir. 1979) ("Any good trial lawyer will testify that there are significant tactical differences in presenting and arguing a case to a jury as opposed to a judge."). While we agree that the foregoing considerations should inform the trial court's discretion under Rule 39(c), we do not believe Judge Lowe committed reversible error on the facts of this case.

First, and most significantly, Judge Lowe did not wait until the verdict was returned before deciding that the verdict would be advisory. Accordingly, there was no danger that the trial judge would veto the jury's verdict. *Cf. Thompson*, 963 F.2d at 888 (court declared jury advisory after verdict); *Bereda*, 865 F.2d at

50 (same).[49]

Nor do we read Rule 39(c)'s provision for "trial by consent" to mandate the court's acceptance of the jury's verdict in this case. Rule 39(c) provides that the court, "with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." Fed. R. Civ. P. 39(c) (emphasis added). Thus, when both parties consent, Rule 39(c) invests the trial court with the discretion but not there duty to submit an equitable claim to the jury for a binding verdict. While the litigants are free to request a jury trial on an equitable claim, they cannot impose such a trial on an unwilling court. *See* 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 39.11 (2d ed. 1993) ("Thus in private litigation the court and the parties can agree to try equitable actions to a jury whose verdict will have the effect of a common law verdict.") (emphasis in original). Accordingly, even if we were to accept Merex's argument that Fairchild consented to Merex's demand for a jury trial of its promissory estoppel claim, such consent would not divest the trial judge of her discretion to decide the equitable issue.

Finally, although Rule 39(c) does not expressly require advance notice to the parties of the court's intention to treat the jury as advisory, we agree that such notice is preferable. In the absence of an express statutory mandate, however, we are not inclined to reverse on this basis alone, at least absent some demonstrable prejudice to the complaining party. Given the minimal strictures of federal pleading, it will sometimes not be clear until well into the trial whether an issue is equitable or legal.

Accordingly, we hold that the district court did not abuse its discretion by declaring the jury advisory after the plaintiff rested its case.

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[49]We recognize that the trial judge in *AMF Tuboscope* declared the jury advisory "on the eve of trial." 352 F.2d at 155. We note, however, that before reaching the Rule 39(c) issue, the Tenth Circuit had held that the parties were entitled to a jury trial as a matter of right. *See* 352 F.2d at 153. Hence, the trial judge in that case had *no* discretion to declare the jury advisory. *See* 352 F.2d at 155 ("We are of the opinion that the Chief Judge abused his discretion, *if discretion he had under existing the* [sic] *circumstances*, in denying a jury trial.") (emphasis added).

CONCLUSION

We have carefully considered all of Merex's many remaining arguments and find them meritless. The judgment is affirmed.

APPENDIX D - ORDER OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ENDORSED UPON LETTER FROM COUNSEL FOR MEREX A.G., MEREX CORPORATION AND PETER C. LACHMANN TO THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 2, 1986

April 2, 1986

[HANDWRITTEN:] Defendants are to produce ***all*** relevant files, under protective order if necessary. Rule 26. Responsive papers to motion to be filed by April 30, 1986. SO ORDERED.
/signature
Mary Johnson Lowe, U.S.D.J.

By Hand

Honorable Mary Johnson Lowe
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: *Merex, A.G., Merex Corporation, Peter C. Lachmann v. Fairchild Weston Systems, Inc.* - 85 Civ 6596 (MJL)

Dear Judge Lowe:

We are attorneys for plaintiffs, Merex A.G., Merex Corporation and Peter C. Lachmann in the above action. We are in receipt of defendant, Fairchild Weston Systems, Inc."s (Fairchild's) Motion for Summary Judgment. The moving papers are exceptionally lengthy. Pursuant to the Court's January 21, 1986 pre-trial conference Order, plaintiffs response to the summary judgment motion is due by April 15, 1986. We have conferred with Fairchild's counsel to request a fifteen (15) day extension for plaintiffs' response. Fairchild's counsel advises that Fairchild does not present objection to our request, but asks that we submit a letter to the Court for approval of the extension. Accordingly, we request that plaintiffs' service and filing of responsive papers to the pending motion be extended to and including *April 30, 1986*.

Further in the Rule 56(f) discovery undertaken by plaintiffs, documentation has been produced from Fairchild. Additionally, through deposition testimony certain files relating to the Fairchild/Merex ANNA Project "Sales Inquiry File, No. 4290-017" and the "Pricing File". Review of the deposition transcripts indicates that the identified files may well contain additional writings relating to the 8% commission agreement between Fairchild and Merex, and relating to Lachmann's claims. We have requested that Fairchild produce these particular files to us, but our request has been denied. We enclose for your review copies of our March 26, 1986 correspondence and Fairchild's counsel's March 28, 1986 reply concerning production of these files.

Respectfully, we request that the Court order production of these files in order that we may review them prior to plaintiffs' submission of papers responsive to the pending motion. It is our view that production of these files and our review of them prior to presentation of responsive papers is justified and necessary in order for us properly to present defenses to the motion. Pursuant to

SDNY Local Rule 3(c)(1) we are available for an informal conference at the Court's convenience concerning this request.

Very truly yours,

/signature
Daniel J. O'Callaghan

DJO/bs
Encls.

cc: Roy A. Klein, Esq.
McGarahan & Heard
By Hand

APPENDIX E - MEMORANDUM AND ORDER OF UNITED STATES MAGISTRATE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 18, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)
MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES MAGISTRATE

Plaintiff's discovery motion was referred to me by Order dated January 12, 1989. Despite an effort early on, in the context of a conference call concerning scheduling, to resolve the motion by compromise negotiation, the matter only deteriorated further, resulting in the filing of a discovery motion by the defendant as well (in part in the nature of a cross-motion) and numerous further submissions, including an 86-page Reply and Opposition Affirmation by plaintiffs' counsel. In toto, the papers filed exceed three inches in height. Indeed, this case is illustrative of the unfortunate diversion that counsel can create when they focus on sanctions motions and past events rather than being future directed and devoting their time, energies and the resources of their clients to conducting the discovery desired by each side and readying the

case for trial. This case also illustrates the difficulties in fixing responsibility for events that occurred several years earlier and, more important, the fruitlessness of such an attempt. Significantly, the granting of the relief requested (to the extent that each party seeks to limit the discovery which may be conducted by the other) would affect the trial of the action only by burdening the Court with a less prepared presentation and otherwise inhibiting the truth seeking function of the discovery and trial processes. Any argument of plaintiffs that the additional discovery would create an unfair delay or economic burden on them is wholly undercut by the lengths gone to on these motions. Nor is it beneficial to encourage the excessive motion practice that has occurred here by fee shifting which, if fully compensatory, would be extraordinary. With these observations in mind, we turn to the specific relief requested, noting at the outset that despite the length of the papers presented, they have been read at least once and, in some instances, twice.

Plaintiffs' motion was tripartite and sought an order:

(1) pursuant to FRCP Rule 37 imposing sanctions against Fairchild for its failure to observe the April 2, 1986 order;

(2) pursuant to FRCP Rule 26(f) compelling the attendance of C. Fanneron for deposition as noticed; [and]

(3) pursuant to FRCP Rule 2 6 (c) restraining S. Wahl from improper conduct at depositions....

We will treat the requests *seriatim.*

The April 2, 1986 Order[50] which plaintiffs seek to enforce is an endorsement on plaintiffs' letter of the same date requesting production of two files related to the ANNA project "Sales and Inquiry File" No. 4290-017 and the "Pricing File." The endorsement read in relevant part as follows: "Defendants are to produce all relevant files, under a protective order if necessary. Rule 26." In my view, this brief endorsement cannot be a predicate for the sanctions motion by plaintiffs which takes issue with the

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[50]The Order was filed on April 4, 1986; otherwise it is undated.

defendant's failure to produce documents other than the two files referenced in the letter which bore the Court's endorsement. This conclusion results from the broad language of the endorsement which leads to its unenforceability due to the inevitable uncertainty of its meaning. Analogous authority is found in cases addressing the enforceability of injunctive orders under Rule 65(d), *see, e.g., Powell v. Ward*, 643 F. 2d 924, 931 (2d Cir.) , *cert. denied*, 454 U.S. 832 (1981), and in cases concerning the enforceability of interrogatories seeking all information on a topic, *see, e.g., Mort v. A/S D/S Svendborg*, 41 F.R.D. 225, 227 (E.D. Pa. 1966); *Stovall v. Gulf of S. Am. Steamship Co.*, 30 F.R.D. 152, 154 (S.D. Tex. 1961). Indeed, the difficulty in interpretation was clear from the outset. Plaintiffs read the order broadly, as they still do (see ¶ 69 of Plaintiffs' Reply Affirmation), and defendant read the order as not expanding the limited discovery that had been ordered in the context of the then pending summary judgment motion. (See Exhibit J to Defendant's Opposition Affidavit). Nor can it be said that defendant's argument, that the reference to Rule 26 was a reference to the protective order provisions of that rule, is an unreasonable interpretation. In addition, to the extent that plaintiffs object to having received in 1986 certain documents in redacted form, there is no question that they were well aware of the redactions and could have pursued the matter more vigorously at the time before Judge Lowe. In sum, plaintiffs' motion for sanctions under Rule 37 for defendant's "failure" to comply with the April 2, 1986 Order is denied.

Second, plaintiff seeks to compel the deposition of Charles Fanneron, defendant's assistant comptroller. This deposition is the subject of defendant's cross-motion as well, which, in part, seeks a protective order against vacating the notice of the Fanneron deposition. Having reviewed the papers submitted by both parties, I am not persuaded that defendant's request for a protective order is well-supported in that Mr. Fanneron seems to have been significantly involved in the events at issue.[51] However, unless I am informed to the contrary, there would appear to be no reason

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[51]In light of this decision, I will not address the various historical and procedural arguments which the parties have raised concerning consent to and/or waiver of the Fanneron deposition.

for the deposition to continue for more than a single day. In this connection, it will be recalled that plaintiffs also sought an order restraining the defendant's general counsel from improper conduct at the continued deposition of Mr. Fanneron. Without attempting to evaluate the appropriateness of any counsel's conduct from the paper record, at all future depositions only counsel of record should make objections or otherwise speak and all counsel should conduct themselves consistently with the standing orders of the Eastern District as to counsel's conduct at depositions.

We turn now to those portions of defendant's motion which have not been previously addressed, namely, defendant's request for an order to modify the December 8, 1988 Order of the Honorable Mary Johnson Lowe to permit defendant to take depositions of plaintiffs instead of serving written interrogatories as therein provided. Plaintiffs' central objection to this request is that defendant waived its opportunity to take Rule 26 discovery by having failed to do so while defendant's summary judgment motion was pending and when plaintiffs had been given an opportunity to take Rule 56 discovery. The bottom line is that all parties recognize that regular discovery has not occurred in this case (see ¶ 70 Plaintiffs' Reply Affirmation). Given this Court's view that nothing that has occurred should prevent the normal completion of discovery, defendant's motion is granted, at least to the extent that defendant may conduct additional discovery which is not repetitive of discovery previously conducted and is consistent with the Federal Rules of Civil Procedure and our Local Rules. In that connection, defendant's discussion in its Reply Affidavit ¶ 7 would appear to be a reasonable description of the discovery which it would be permissible to conduct.

Finally, we turn to defendant's motion seeking "sanctions against plaintiffs and their counsel for abusive, burdensome and harassing conduct together with the costs and expenses of defendant's motion papers." A substantial portion of the papers submitted did concern the cross-motions for sanctions. In this Court's view, while counsel for the plaintiffs has taken the more extreme and unjustified approach, they have not been wholly unsuccessful. Moreover, it must always be remembered that it takes two to fight and that the ultimate burden is imposed on the clients, and secondarily upon the Court, whose case is not closer to trial than it was when plaintiffs' motion was filed on December

20, 1988. Thus, defendant's motion for sanctions is denied.

The Court trusts that counsel will agree on a schedule for the completion of the discovery allowed by this Memorandum and Order. If this trust is misplaced, alternative scheduling proposals should be submitted, and a schedule will be set. Counsel should be mindful of the fact that requiring the Court to set the schedule may result in one less convenient to counsel and their clients.

IT IS SO ORDERED.

DATED: New York, New York
May 18, 1989

/Signature
NAOMI REICE BUCHWALD
UNITED STATES MAGISTRATE

APPENDIX F - ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC DATED SEPTEMBER 8, 1994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of September, one thousand nine hundred and ninety-four.

Docket Number 93-9286

/seal
United States Court of Appeals
Filed
September 8, 1994
George Lange III, Clerk
Second Circuit

MEREX A.G.; MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs-Appellants,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for plaintiffs-appellants, Merex A.G., et al.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III
Clerk
By:

/signature

Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX G - ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING ACTION DATED JANUARY 21, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)

ORDER AND JUDGMENT

This action having come on for trial before the Court, the Honorable Mary Johnson Lowe presiding, and the issues having been duly tried and a decision dated December 29, 1992 having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, that the action be dismissed on the merits, and that defendant Fairchild Weston Systems Inc. recover of plaintiff Merex A.G. the costs of this action.

DATED at
New York, New York on this
21 day of January, 1993

/Signature
Kevin Thomas Duffy
U.S.D.J

APPENDIX H - PLAINTIFFS' REQUEST FOR 28 U.S.C. §636 RECONSIDERATION, DATED JUNE 2, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)

I, Daniel J. O'Callaghan, attorney on behalf of Merex A.G., Merex Corporation and Peter C. Lachmann do affirm under penalty of perjury the following matters in Plaintiffs' request for 28 USC §636 reconsideration of Magistrate Naomi Reice Buchwald's Memorandum and Order, dated May 18, 1989, ("**Mag. Order**") received by mail at Plaintiffs' counsel office on May 22, 1989. This request seeks *de novo* reconsideration upon grounds outlined *infra*, in particular as the December 12, 1988, Order for Magistrate submission directed a "Report and Recommendation", (see, e.g. *Pauley v. United Operating Co.*, 606 F.Supp. 520 (D. Mich. 1985) but which Mag. Order in addition to being clearly erroneous or contrary to law as outlined below, through the format used impedes Plaintiffs' reliance upon a record which indisputably supports plaintiffs' motion in toto including mandatory Rule 37 sanctions and which indisputably rejects as insincere and vexatious Fairchild's opposition and unauthorized cross-motion."

1. *Mag. Order. P.1, Lines 1-14. Objection.* The Mag. Order throughout omits reference to significant facts and discussion of

significant events, for example, at this location the Order fails to observe that Plaintiffs' March 9, 1989, Reply and Opposition Affirmation ("March 9 Affirm.") is lengthy since *in response* to Fairchild's recharacterization of a *seven (7) page moving affirmation* through submission of a 2 lb., 40 paragraph, 29 page, Exhibits A-Q, unauthorized "cross-motion" containing significant omission and half-truth, presented in contravention of Local Rule 3. March 9 Affirm. 19 fn 3, ¶¶ 58-61; Exh. "8"; Plaintiffs' April 21, 1989, Sup'l. Affirm. ¶4; Fairchild Reply Aff'd., April 14, 1989, Exh's A and B. The motion concentrates on the need for C. Fanneron's full and fair deposition, facts obscured by the Mag. Order's "tripartite" listing (P.2, lines 16-24). Contrariwise, the cross-motion almost exclusively concentrates on Fairchild's justification for secreting documents, then redacting them in 1986; it fails even to address Fairchild's omission of Fanneron as a knowledgeable witness, indeed, the author of the secreted files, an omission which the order similarly fails to note:

> "[F]airchild advised by *January 27, 1986*, letter [of] limited documents Fairchild chose to present prior to [Plaintiffs'] rule 56(f) depositions. *[N]one* of the subsequently produced [April 2, 1986 Order referenced files] were identified, *nor were T. Egan or C. Fanneron*, the principal authors of those files. Indeed, Fairchild *represented*:
>
> > 'Messrs. *Lay, Neasham and Pighi* [Fairchild's President] are the *only* people in Fairchild's employ *who may have knowledge* of the subject matter to be covered in your Rule 56 discovery'."
> > (Fairchild January 27, 1986 letter.) (Exh. "C") [March 9 Affirm., ¶8 (emphasis added)].

The Mag. Order reference to "*focus on sanctions motion*" is reflective, not of the seven (7) page *motion, but of the cross-motion recharacterization*, a submission in violation of 28 USC §1927. Having diverted the focus of a simple motion to comprehensive "sanctions" issues, Fairchild placed its own conduct center-stage.

The "past events" mentioned are those succinctly documented in

the March 9 Affirm. ¶1-20. As outlined these events cost the (presently) impoverished plaintiffs expenses in excess of $150,000. Indeed, the only "past events" between commencement and the September - October, 1988, rejection of Fairchild's summary judgment motions were:

June 21, 1985	Complaint Filed
October 16, 1985	Fairchild Motion to dismiss and answer in part to complaint
January 6, 1986	Amended Complaint Filed
January 21, 1986	Pre-Trial Conference; Fairchild advises that it will move for summary judgment upon absence of *writings* confirmatory of a commission agreement and Rule 11 sanctions. Plaintiffs authorized to conduct Rule 56 (f) discovery for 60 days.
March 31, 1986	Fairchild moves for summary judgment and Rule 11 sanctions in the amount of $181,000.
April 2, 1986	Court orders Fairchild to produce "*all* relevant files, under protective order, if necessary, Rule 26..."

2. *Mag. Order. P.1. Lines 14-16 and P.2., Line 1. Objection.* It is clear error and contrary to law for the Mag. Order to fail to "fix responsibility" for the above minimal, discrete and documented events; to represent "difficulty" and "fruitlessness" of attempt. The record is compelling that Fairchild intentionally secreted witnesses, Egan and Fanneron, intentionally secreted their files containing *scores* of documents confirmatory of commission agreement, contrary to Rules 26, 30, 34 and 37, *then* moved for summary judgment in their absence, *then* failed to produce *all* these documents in non-redacted form notwithstanding an April 2, 1986, Order to produce "*all* relevant files" ("April 1986 Order"),

then redacted the documents which were produced without protective order, *then*, in December, 1988, refused to produce the principal author of these secreted documents, Fanneron, compelling this an otherwise unnecessary motion. The Mag. Order omits reference to these facts, fails to direct a Rule 37(d)(4) hearing and fails to present findings that Fairchild's opposition to the motion to compel Fanneron's deposition was substantially justified as indisputably it was not.

The Mag. Order fails to observe that Fairchild opposed the motion to compel Fanneron's deposition *only* upon grounds that "Egan was produced" and that a "confidentiality" agreement was necessary. This is both misrepresentative and in all events *not* substantial justification for refusal to produce Fanneron, particularly in the context of 123 pages of Fanneron April, 1986 produced (redacted) "accounting ["pricing"] files" which demonstrate definitively Fairchild's *written* representation of commission obligation to Plaintiffs.

3. *Mag. Order P.2 Lines 6-10. Objection.* The magistrate's views appear to be in conflict with Canons of Professional Responsibility 2 and 7, in particular in the context of impoverished plaintiffs, whose *disbursements* for travel and lodging were the *only* issue, other than equitable waiver, upon which Plaintiffs objected to Fairchild's otherwise insincere "cross-motion". The "lengths gone to by Plaintiffs" are not extraordinary, but reflective of the comprehensiveness of Fairchild abuse, virtually undefended and comprehensively documented in this record.

The motion practice is excessive by Fairchild and Fairchild alone through provocation of a lengthy record upon voluminous and misleading cross-motion recharacterization of an otherwise simple motion. It is contrary to Rule 37(b) and (d) to decline compensation to plaintiffs for Fairchild's (i) wilful refusal to comply with the April 1986 Order and (ii) unjustified opposition to the Fanneron deposition.

Pursuant to Rule 37(d) Fairchild did *not* apply for a protective order nor was failure to produce this essential witness substantially justified. See, Rule 37, 1970 Amendment, Sub'd (d) ¶4; ***Kakuwa v. Sanchez***, 498 F2d 1223 (C.A. Guam 1974); ***Yannitelli v. Navierus De Puerto Rico***, 103 FRD 413 (SDNY 1984); ***Philpot v. Philco-Ford Corp.***, 63 FRD 672 (ED Pa 1974); ***Teppichhaus Dr. Dahesch v. Setareh, et al.***, 87 Civ. 0345, 37/88 Star. Dec. 330

(SDNY, Sept. 9, 1988) (MJL); *Moore's Fed. Prac. and Proced.* §15.13, "*Rule 37(d)*", (1988). Indeed, the Magistrate's reference

to "fee shifting" stands 37 on its head: the Magistrate declines to implement Rule 37 sanctions against a documented violator, Fairchild, because so to do would be extraordinary "if fully compensatory". Thus, Plaintiffs, victims of Fairchild's Rule 37 violations, again are victimized, while the violator is exonerated. This is illogical and contrary to Rule 37.

4. *Mag. Order P. 3, Lines 7-13. Objection. This is the linchpin of the Mag. Order and the portion most significantly of clear error.* The files identified in the April 1986 Order are in the hundreds of pages. In 1986, Plaintiffs sought *these files*, 1) in *non-redacted* form as required by law, Rule 26(b)(i); *United States of America v. Davis, et al.*, 85 Civ. 6090, 38/88 Star. Dec. 130 (SDNY, Sept. 13, 1988) (KC); (2) in *complete* quantity, again as required by law, Rules 26 and 34; *additionally*, Plaintiffs sought (3) production of *"OTHER" relevant files*. All were directed to be produced by the April 1986 Order. These categories are distinguished, March 9 Affirm. ¶¶12-13, w/fn2. The Mag. Order's failure to recognize these distinctions is clear error. Further, the Mag. Order's identification of one category *only* as *in "issue"* i.e. *"other"* relevant files - viz., those described at March 9 Affirm, ¶17 (a)-(o) is clear error and contrary to law. *All* were "in issue", *all* should have been produced in 1986 in complete and non-redacted form.

The Mag. Order's conclusion that the "broad language" of the April 1986 Order was *"unenforceable due to the inevitable uncertainty of its meaning"* is irrational. Even Fairchild did not contend this. Fairchild had in its possession complete accounting, i.e. "Pricing" files, developed since *1982*. Clearly, Fairchild understood their relevance to its lack of "writings confirmatory of a commission agreement" contention. Clearly, Plaintiffs sought these documents in a 1985 document demand (Exh. 2). Clearly, it is error for the Mag. Order to omit reference to Fairchild's *documented* understanding of "relevance" concerning these files:

> (i) "By letter dated February 14, 1986, *Fairchild refused to produce documents* sought in Plaintiffs' document demand, served October, *1985, representing*:

"[I]ndeed, as noted in our January 27 letter, the files produced by Fairchild go well beyond the scope of Judge Lowe's [January 21, 1986 conference] order. In any case, the *files produced constitute all the relevant documents in Fairchild's possession responsive to Plaintiffs' original document demand.* [Exh. 2] Accordingly, your request to inspect and copy the files at Fairchild's office is denied." [March 9 Affirm., ¶10. (emphasis added).], and

(ii) "*[N]one* of the Exhibits contained in *Exhs. 3A and 13A* [Egan/Fanneron "Pricing Files"] had been produced, nor were produced in *un*redacted form, if at all, *until* during/after November, *1988*. However, in the...*1986* [Fairchild Summary Judgment] Reply Affidavit, Fairchild for example, repeatedly had represented:

¶3 "[F]airchild had produced all its relevant documents (¶¶ 11-13 *infra*)."

¶8(b) *Subsequent to April, 1984*, after Fairchild commenced direct negotiations with the PRC, the *internal documents show that Fairchild did not contemplate paying Merex* any compensation in connection with the transaction.

¶11 [F]airchild has produced all its relevant documents...

¶13 *[F]airchild has not produced any documents that support Plaintiffs' claims because*, consistent with Fairchild's repeated statements in this case that *no such documents exist, Fairchild's intensive review* of its files *did not uncover any such documents*." (Emphasis added)." [March 9 Affirm., ¶16, (emphasis added).]

In clear error, the Mag. Order fails to recognize the *Court's Jan 21, 1986 "scope"* of discovery authorization to plaintiffs:

MR. O'CALLAGHAN: *Are you saying, your Honor, that the discovery is limited to the issue of a contract between the parties and not to damages? Is that the way we are*

distinguishing.

THE COURT: That is correct, 56(f).

January 21, 1986, conference, T.81 (Exh.'B'). (emphasis added).

The files upon 1986 (redacted) production revealed scores of writings discussing alternative "commission" payment obligations to plaintiffs, i.e. issues of contract between the parties, *not* damages. *The Mag. Order endorsement of Fairchild's scope interpretation of "limited discovery", P.3 lines 22-24, is clear error*, observed in scores of Egan and Fanneron "Pricing Files" which Fairchild *failed to produce* pursuant to plaintiffs' *1985* document demand (i.e. before seven (7) Fairchild depositions were taken without them and in search for them), produced (*in part*, and redacted) *only* upon the April 1986 Order, and that after the Court's review and rejection of Fairchild's March 28, 1986, letter which refused *all* production, and (mis)characterized the files as follows:

"With respect to the "pricing file," I stated Fairchild's objections to the production of this type of accounting file at the conclusion of Mr. Egan's deposition. Specifically, *such documents are not subject to discovery because*: (a) they are privileged in that they contain confidential proprietary business information regarding pricing, cost and profit; (b) *they are irrelevant as a matter of law to the issue of the existence of an alleged commission agreement between Fairchild and Merex because they are not the type of documents that can be used to satisfy the writing requirement under New York's Statute of Frauds*; and (c) *they are irrelevant and lack any probative value whatsoever* in view of Mr. Egan's testimony that they are internal Fairchild documents that contain information regarding various alternative hypothetical scenarios and thus do not necessarily reflect any actual understanding between the parties."

[Fairchild March 28, 1986, letter.
This letter was *enclosed to Judge Lowe upon request for the April 1986 order*, see Exh."1"].

The documents as produced (1986, redacted) for example, in relevant part record:

1.	Commission P. Lachmann	No. 000001
2.	Commissions/Fees to be paid on Anna" $40K P. Lachmann	No. 000072
3.	2% Comm. SY Lee Merex Lachmann	No. 000084
4.	Lachmann, Lee, Merex 6% of Sell	Nos.000085 000093-96
5.	Lachmann 2% ($500,000) Merex/Lee ($1,000,000)	No. 000088
6.	Lachmann 2%	No. 000092
7.	Do we have a formal agreement with Lachmann - Yes, was 10% Merex Lee	No. 000112
8.	Lachmann at 2% of S.P.	No. 000113
9.	4% -to Merex Merex Comm = 4 + % Net Comm $2.9M	No. 000126
10.	Current Agreement with Merex ...Merex gets the differential of 4.0 million or 8% commission	No. 000127
11.	Lachmann at 2% of our Price	No. 000129
12.	Lachmann Comm. 1000 Merex cut 4.1	No. 000130
13.	10% for Merex, 5.4	No. 000151
14.	Commission 3%	No. 020000
15.	6% Lachmann	No. 020008-10 020111-13,15,22
16.	6% commission	No. 020009
17.	Commission to Lachmann 6% Commission to Merex	No. 020011-15 020059-62 020084 020087 020092-93 020098-109

18. 6% to Lachmann	No. 020017
19. Lachmann 1.046K	No. 020018
20. 6% Comm. Lachmann	No. 020020 020072-75
21. 6% Lachmann	No. 020021 020071
22. % Lachmann 816K	No. 020022
23. Commission, Lachmann	No. 020026A
24. 6% to Lachmann	No. 020027
25. Commission P. Lachmann	No. 020030
26. Commission 3%	No. 020031-32
27. Commission 2%, 6%	No. 020033-34
28. Commission Lachmann, Lee Merex 6% of Sell	No. 020038
29. 6% Lachmann	No. 020040
30. Lachmann, Lee, Merex 6% of Sell	No. 020041-42
31. Lachmann 2% Lee & Merex 1000	No. 020043
32. Lachmann 2%	No. 020044 020046-48
33. Lachmann 2% Merex et al. 1000	No. 020045
34. Note 2 L.H. Pighi is looking to reduce the total commission received by Merex and Lachmann to 13% combined...	No. 020052
35. This price does not contain any Merex commission since we (Fairchild) were quoting to Merex, who in turn would add their commission and give it to the customer. The price does contain P. Lachmann's 6%...	No. 020053
36. If...then Merex at the time was talking about a 15% commission and Lachmann a 6% commission...[for each dollar] Merex would reduce their	

	commission by 15 cents, Lachmann by 6 cents	No. 020054
37.	Prices include Lachmann at 6%	No. 020063
38.	Merex & Lachmann 15% Merex & Lachmann 13%	No. 020065
39.	Merex & Lachmann 13% of Sell Peter Lachmann 6% of Sell Combined Commission 15%, of Sell Price to customers, 15%, Merex & Lachmann	No. 020068
40.	Lachmann Commission (on sales) Merex Commission	No. 020037

It is clear error to endorse a failure to produce such documents as "irrelevant" or outside the "scope" of "limited discovery" in the context of a dispute about the "existence of a commission agreement". It is inconceivable that these "Pricing" files address very much else except the existence of a commission agreement. [The above Egan and Fanneron Pricing Files were presented on this motion through substantial example in Exhibits 3B and 13A (non-redacted) and 31A (redacted) although at times differently numbered since Fairchild in breach of agreement vexatiously produced these documents 1988-89 in unnumbered fashion in six installments over three (3) months notwithstanding availability since 1982-84 and 1988 Court direction for production in thirty (30) days. (March 9 Affirm. ¶12, fn2).

The [i]llogic of the Mag. Order's interpretation that the April 1986 order was "*unenforceable due to...inevitable uncertainty...*" supports a Fairchild refusal to produce *any* files, i.e. too broad means produce nothing. Even Fairchild did not contend that it did not understand the Order nor did Fairchild refuse to produce any files. Quite to the contrary, Fairchild understood precisely the critical relevance of these files, understood exactly what to produce *from these files*, what to withhold *from these files* (e.g., Egan's April, 1984, notation "**Commission - cut-out**"), and what to redact so to make as incomprehensible as possible any usage by plaintiffs in defense of the motions.

The Mag. Order's reliance upon Fairchild's April 9, 1986, letter justification (Exh J) for refusal to produce these files in non-redacted form together with the Mag. Order's apparent exoneration

of their secretion through Fairchild motions is baffling, clearly erroneous and contrary to law. Similarly contrary to law is the Mag. Order's failure to award mandatory Rule 37(d) sanctions upon Fairchild's failure to comply with the Order, i.e. Fairchild's wilful *withholding of portions* (the Mag. Order's reference to "other" files in "issue" P.3 lines 8-10) and Fairchild's unauthorized *redaction of parts*. (the Mag. Order exonerates this central abuse). *Badalamenti v. Dunham's Inc.*. 118 FRD 437 (ED Mich 1987).

5. *Mag. Order. P.4. Lines 4-10. Objection.* Plaintiffs' objection to documents received in 1986 is *not* just to receipt of "certain documents in redacted form", but to *all* "Pricing Files" received in that form, viz., as identified in Fairchild Summary Judgment Reply Affd. (May 14, 1986, Exh "A"):

"Egan Accounting Work Papers"	51 pages,
"*Fanneron Accounting Work Papers*"	020000-020122,
i.e., *123 pages*	

The Federal precedent cited and Rules 26, 34 and 37 do not authorize redaction absent a protective order. It is clearly erroneous and contrary to law to authorize or exonerate such a violation under any rationale. The Mag. Order justification that Plaintiffs "were well aware of the redactions and could have pursued the matter more vigorously at the time before Judge Lowe" is inaccurate. For example, it is clear error for the Mag. Order to omit reference to Plaintiffs' April 29, 1986 letter pursuit of the matter to Judge Lowe:

(i) "[P]reparation of opposition papers has been hampered since *Fairchild has failed completely to comply with the Court's April 2, 1986 letter endorsement Order* requiring production of "*all* relevant documents". Pursuant to this Order on April 11, 1986 *Fairchild produced "redacted" copies* of critical documents. Fairchild did not permit review of original documents, and numerous documents produced were illegible. Upon expedited review *we have addressed with particular emphasis the content of the "redacted" documents in our opposition papers*. However, this has taken exceptional time to accomplish because of Fairchild's voluminous motion papers and tardy document production.

Moreover, Fairchild refuses to produce *all* relevant documents."

> Plaintiffs' April 29, 1986, letter to Judge Lowe (Exh. "K"). [March 9, Affirm., ¶13 (emphasis added)];

and the *Court's 1988 acknowledgment*:

(ii) "Plaintiffs were *not* required to seek another order beyond the April 2, 1986 Order; "produce *all*", means just that, not some, and not some redacted. As the November 15, [1988] conference records:

[MR. O'CALLAGHAN: [I]f you might recall, the discovery period ended, however, I think it was the last day before the end of the discovery period I took a deposition of Fairchild's controller, Mr. Egan, and he identified these are internal documents of Fairchild, files called the pricing file and the sales inquiry file. Fairchild refused to produce these. I wrote to your Honor. You directed that all relevant files be produced. Fairchild then produced those records and I think it's fair to say several hundred pages, but they redacted them, and I enclosed a copy of the redacted pages. It's meaningless.

THE COURT: Mr. Klein, produce the entire record unredacted. *Rule 26 doesn't talk about redaction.* If you claim privilege in any of these records the proper way to handle it is to make a motion setting forth why you feel these records are subject to privilege or confidentiality or whatever, but *you have no right under Rule 26 to unilaterally redact records*.

MR. O'CALLAGHAN: On this subject, I met with Mr. Klein. There is a recent decision of Judge Conboy on this in this district on that subject. I gave Mr. Klein a copy -

THE COURT: Is the same thing inconsistent with what I said?

MR. O'CALLAGHAN: Absolutely not.

THE COURT: *That is Hornbook law...*

THE COURT: *[O]n your letter requesting those documents [April 2, 1986], did I so order that letter?*

MP. O'CALLAGHAN: *Yes, you did, your Honor.*

THE COURT: *Then that is a Rule 37 order and the only question I have, Mr. Klein, is why didn't you obey the order?*

MR. KLEIN: Your Honor, you so ordered Fairchild to produce all relevant documents. We had extensive correspondence with Mr. O'Callaghan in April '86 explaining to him our concern that these accounting documents contained a great deal of proprietary confidential business information regarding pricing, regarding cost, regarding profit that Fairchild earned on the sale of these cameras. We also expressed our concern that this information be disseminated to plaintiffs and possibly get out into the marketplace to customers.

THE COURT: Counsel, I don't care about what you expressed to Mr. O'Callaghan. We have a very timeworn procedure for confidential records. You serve the records with an order of confidentiality and if I believe that it's supportable, I sign it. And counsel is bound by that order. *You don't withhold on your own.*

T. - 20-22 (EXH. "L")

Fairchild over-looked advising the Court that its "confidentiality" pretense had been removed as an impediment to production at the *first* deposition taken in the case, that in February *1986*, *see*, 'Exh. 11'."

[March 9, Affirmation ¶33, emphasis added).]

Further "vigor" by Plaintiffs was unnecessary; Fairchild was in clear violation of existing law: the documents *observed* redacted without authorization before Judge Lowe upon the motion;

additional "vigorous pursuit" was unnecessary.

6. *Mag. Order. P.4, Lines 15-20. Objection.* The order fails to satisfy Rule 37(d) which mandates the obtaining of a protective order *before* a default in deposition appearance. Fairchild's mere *letter* stratagem undermines this rule. Moreover, Fanneron's deposition is extraordinarily significant in light of his previously *secreted 123 pages* of detailed notes evidencing numerous meetings between Fairchild executives at which commissions payable to Plaintiffs were documented. March 9 Affirm., ¶39-40. Fairchild is unable to present substantial justification for opposition to the Fanneron deposition; Rule 37(d) sanctions are mandatory. Fairchild failed to demonstrate good cause for a protective order; mere conclusory claims of "harassment" are insufficient. *United States v. Garret*, 571 F2d 1323 (5th Cir. 1978); *Grinnel Corp. v. Hackett*, 70 FRD 326 (D. RI 1976). Contrary to Rule 37(d), the Mag. Order fails not only to award sanctions but also improperly orders that the critical Fanneron deposition *be conducted in one day*. Again, even Fairchild did not ask for this. In light of Fanneron's secretion by Fairchild and the significance and volume of his files (123 pages), this is objectionable. It is not likely that deposition concerning 123 pages of detailed "commission" notations will be accomplished in a "single day".

7. *Mag. Order. P.5. Lines 15-25. Objection.* The additional discovery ordered of plaintiffs is objectionable particularly since Fairchild's improper practices have unduly burdened Plaintiffs, see March 9 Affirm. ¶¶s 63-66, 70-71. In all events, Fairchild should be limited in the duration of these depositions. "Regular discovery" was subverted by improper 1986 Fairchild motions. To allow a re-opening of discovery to "full" after 4 years of Fairchild abuse and neglect is improper; Fairchild failed even to present interrogatories authorized at its request since December, 1988, so to promote an otherwise unnecessary cross-motion. Moreover, to the extent that Plaintiffs relied upon Fairchild to perform work, labor and services in light of records available to Fairchild, if additional depositions are at all authorized upon this reconsideration, which is opposed, Fairchild should be able to complete these depositions in one or two days requiring no more than one plaintiffs' trip from Germany. However, it is clear error for the Mag. Order to decline imposition of Rule 37 sanctions against Fairchild which adamantly refused reasonable compromise

concerning these depositions thereby promoting an unnecessary cross-motion, see, Exh. 17 letters dated March 1, 1989, (Plaintiffs) and March 2, 1989, (Fairchild).

The Mag. Order fails to address Plaintiffs request for *additional Fairchild documents*, particularly relating to Fairchild *profit* on the PRC sale and *differently numbered* "Anna Project" Sales Inquiry Files, revealed during recent depositions, particularly the resumed Egan deposition, as identified in *Exh. 17* (Plaintiffs' letter dated February 15, 1989; Fairchild response date February 21, 1989) and *Exh. Q* (Plaintiffs' letter dated December 22, 1988; Fairchild response dated December 23, 1988). Should Fairchild fail to produce these materials, particularly concerning profit, Plaintiffs reserve all rights to object to any Fairchild effort to introduce trial evidence contradictory to the evidence already presented.

8. *Mag. Order. P. 5, Line 26 - P.6, Line 7. Objection.* There does not exist statutory or case law basis for Fairchild's "Rule 37 motion for sanctions against plaintiffs and their counsel for abusive, burdensome and harassing conduct..." Mag. Order consideration is clearly erroneous and contrary to law, particularly since the record is filled with documented, undisputed abuses, significant omissions, half truths and numerous violations of 28 USC §1927 by Fairchild and Fairchild alone. Plaintiffs and their counsel have been rather the victims of Fairchild's excesses, which unfortunately at this juncture now are exonerated by the Mag. Order. See March 9 Affirm. ¶¶s 55, 73, 79 and Plaintiffs' April 21, 1989, Suppl. Affirm., ¶10 and Exh. 19 for a discrete record of Fairchild virtually undefended, improper practices and mischievous efforts to confuse and misrepresent a record documented to the contrary.

Dated: June 2, 1989
New York, New York

/Signature
Daniel J. O'Callaghan

APPENDIX I - TRANSCRIPT OF CONFERENCE BEFORE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 13, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)

December 13, 1989
11:10 a.m.

Before:

HON. MARY JOHNSON LOWE,
District Judge

APPEARANCES
DANIEL J. O'CALLAGHAN
Attorney for Plaintiffs
McGARRAHAN & HEARD
Attorneys for Defendant
ROY KLEIN
RONALD W. WEINER

SOUTHERN DISTRICT REPORTERS 212-791-1020

THE COURT: This matter is called because of an appeal by the plaintiffs from the report and recommendation of Magistrate Buchwald. This Court assigned the case to Magistrate Buchwald for all pretrial purposes.

I have no problem in stating that I am absolutely appalled at the way this case has been litigated. And we are going to get back on the track, and the past history will not be repeated in this case.

Let me start.

Mr. O'Callaghan, --

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: -- the first issue was your motion before Magistrate Buchwald to impose sanctions upon the defendants because of what you alleged was a violation of this Court's discovery order dated April 2, 1986.

Is that correct?

MR. O'CALLAGHAN: Well, your Honor, the motion was to seek a deposition of Mr. Fanneron that was --

THE COURT: Wait. We'll deal with that later.

MR. O'CALLAGHAN: But that was a part of that motion. That's correct, your Honor.

THE COURT: All right. And your claim in your motion papers to Magistrate Buchwald, as I read it, it was a set of motion papers in a discovery matter that was eighty-six pages in length, with numerous attachments, at least three-quarters of an inch high.

Now, you tell me what your claim to Magistrate Buchwald was that would justify sanctions against the defendants based upon an alleged violation of that April 2nd, 1986, endorsement.

MR. O'CALLAGHAN: Your Honor, the initial motion paper was, to my recollection, seven pages. Fairchild improperly, in my view, recharacterized the motion through an improper cross-motion.

THE COURT: Mr. O'Callaghan, I am not asking you for your opinion about anything.

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: I am asking you to tell me what your claim was to Magistrate Buchwald which justified your request for sanctions for violation of the order of April 2nd of 1986.

MR. O'CALLAGHAN: In April of '86, Fairchild improperly withheld documents and then redacted those they produced, and still continued to withhold documents right through November of '88.

THE COURT: Is that what your claim was?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Wasn't your claim, rather, that Fairchild violated the endorsement that I put on your letter of April 2, 1986, in that it failed to produce all documents in this case that had been requested?

MR. O'CALLAGHAN: That is the mechanism by which they -- that is the order they violated, your Honor. The April 2 order, they violated.

THE COURT: Now, let's concentrate on that for a moment.

Because of the tons of paper that the magistrate was flooded with by counsel, I don't blame her, since she did not have the view of this case, because she had not dealt with it for the length of time I had, I don't blame her for not understanding and being able to cut through all of the nonsense that was pleaded.

Do you have a copy of the letter of April 2nd,1986?

MR. O'CALLAGHAN: Your letter, your Honor?

THE COURT: No, your letter.

MR. O'CALLAGHAN: With your endorsement?

THE COURT: That's correct.

MR. O'CALLAGHAN: I didn't bring it with me, your Honor.

THE COURT: All right, let's make a record.

MR. O'CALLAGHAN: Mr. Klein has a copy.

THE COURT: I have my copy.

Up until April of 1986, the posture of this case had been that the defendants had made a motion to dismiss certain counts of the complaint based upon the statute of frauds. And you had requested discovery. And I, by order of -- I can give you the exact date -- November 22nd, 1986 [sic], limited discovery in this case solely to the issues pertinent to the statute of frauds claim, so that you could properly respond. Is that not correct?

MR. O'CALLAGHAN: I think my recollection is, you limited Rule 56 after discovery to my request for Rule 56 --

THE COURT: Counsel, please. Please, don't obfuscate, I speak very simple English.

The defendants made a motion to dismiss counts of this complaint based upon the statute of frauds. You complained that you did not have sufficient discovery of the documents in order to respond. And at a conference in November [sic], I specifically limited discovery in this case to the issue of documents necessary for you to respond to the statute of frauds.

Now, that is an order entered in this case, and there is no dispute about that.

Now, let me read from your April 2 1986, letter.

Starting with Paragraph 2: "Further, in the Rule 56(f) discovery undertaken by plaintiffs, documentation has been produced from Fairchild. Additionally, through deposition testimony, certain files relating to Fairchild/Merex's ANNA Project have been identified, in particular, the ANNA Project 'sales inquiry file,'" giving a number, "and the 'pricing file.'

Review of the deposition transcripts indicates that the identified files may well contain additional writings relating to the eight percent commission agreement between Fairchild and Merex and relating to Lachmann's claims.

"We have requested that Fairchild produce these particular files to us, but our request has been denied.

"We enclose for your review copies of our March 26th, 1986, correspondence, and Fairchild's counsel's March 28th, 1986, reply concerning production of these files.

"Respectfully, we request that the Court order production of these files," -- obviously, a reference to the ANNA Project files; that is, the sales inquiry file and the pricing file -- "in order that we may review them prior to plaintiff's submission of papers responsive to the pending motion.

"It is our view that production of these files and our review of them prior to presentation of responsive papers is justified and necessary in order to properly present defenses to the motion."

And I endorsed that letter as follows:

"Defendants are to produce all" -- underlined twice -- "relevant files under protective order, if necessary," and there was a comma, "Rule 26. Responsive papers to motion to be filed by April 30, 1986."

Now, my view of the proceedings up until that date, my orders up to that date, and my supervision of this case, there is absolutely no question in my mind that this order was to produce the very files that you requested in your letter, so that you may respond to the motion to dismiss based upon the statute of frauds.

And I have no problem in saying that I was absolutely appalled, Mr. O'Callaghan, when I picked up this document, which is this eighty-six-page document. And you entitled it a "reply affirmation in support of plaintiff's motion and affirmation in opposition to defendant's cross-motion."

And in this document, you elaborate at great detail what you interpreted that very simple order and endorsement of April 2 to mean.

Now, we're not going to take eighty pages for you to tell me exactly the claim that you made to the magistrate. But what did you claim to Magistrate Buchwald in these voluminous papers that that order meant?

MR. O'CALLAGHAN: If I might respond to the point about voluminous nature --

THE COURT: Wait a minute, Mr. O'Callaghan. I want you to respond exactly to the question that I posed to you.

What did you claim in these documents that that endorsement on your letter meant?

MR. O'CALLAGHAN: That Fairchild did not follow the order to produce all relevant files.

THE COURT: "All relevant files." Relevant to what?

MR. O'CALLAGHAN: The existence of a contractual relationship between Merex, Lachmann and Fairchild in this case, which was the verbal order of the pretrial conference.

THE COURT: Mr. Klein, do you agree that that was the statement and representation made to the magistrate?

MR. KLEIN: No, your Honor. My understanding is that Mr. O'Callaghan's representation to the magistrate was that the April 2nd endorsed order required Fairchild to produce every document in its file relevant in any way to Project ANNA or to this case or responsive to its prior, plaintiffs' prior, Rule 26 document demand.

THE COURT: There is no question that that is an inaccurate statement.

And, Mr. O'Callaghan, I am seriously troubled by you not acknowledging that your argument to the magistrate was that this endorsement meant that I had ordered defendants to produce all documents you had requested in this case prior to my limitation of discovery.

MR. O'CALLAGHAN: I don't quite understand, your Honor, the way these questions are being phrased. My reading of your order was literally that they were to produce all relevant files pursuant to Rule 26. That was my understanding of what you intended.

THE COURT: All right, now, let's back up.

MR. O'CALLAGHAN: And I think that is a fair understanding of what you said.

THE COURT: Well, that's your opinion, and that is exactly why we're having this on the record, because this will never happen again.

MR. O'CALLAGHAN: I think Fairchild failed to observe the order --

THE COURT: I'm not asking you --

MR. O'CALLAGHAN: -- even regarding --

THE COURT: Mr. O'Callaghan, we don't both speak at the same time.

I am not asking you for your opinion of fairness or unfairness. I deal with facts.

Your letter requested two files, because you asserted those files were necessary for you to respond to the defendant's motion based upon the statute of frauds. Prior to this time, I had limited all other discovery in this case until that issue was resolved.

MR. O'CALLAGHAN: You had limited, your Honor, if I might say, you had limited the discovery I asked for to Rule 56(f) discovery to me. I asked for some discovery, and you gave me --

THE COURT: Counsel, look. I don't play a numbers game.

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: I'm saying it in language that I can understand.

I had limited all discovery in this case, except discovery that was necessary for the motion made by the defendants for summary judgment based upon the statute of frauds.

MR. O'CALLAGHAN: If I might respond, your Honor.

At the pretrial back in -- I think it was in January of '86, you limited discovery to the plaintiffs to the existence of a contract between these parties.

THE COURT: Counsel, that's a statute of frauds claim.

Now, you know, you have an unusual talent for saying something in sixty words when two words will do.

MR. O'CALLAGHAN: If I might --

THE COURT: Just wait a minute, Mr. O'Callaghan. We're not going down any primrose path. We're going to make a clear record so an appellate court will know exactly why I am doing what I am doing.

There is absolutely no question that the only discovery permitted was for the statute of frauds motion made by the defendants. Your letter, in unequivocal language, asked me to direct the defendants to produce two certain files, and I refer again to your letter, so that you may properly respond to the statute of frauds motion.

MR. O'CALLAGHAN: Your Honor --

THE COURT: Then when you get before the magistrate, you submit this eighty-page document which totally denies the thrust of the request you made and the endorsement I made. And you so snowed her under with a lot of papers that totally misrepresented the issue that was before this Court in this endorsement, that the magistrate in her opinion said she didn't know how to read the endorsement, and therefore denied your motion for sanctions.

Now, my next question: Did Merex produce the documents that I directed them to produce in the endorsement of the April 2, 1986, letter? Yes or no?

MR. O'CALLAGHAN: I think you misstated, your Honor. I think you meant --

THE COURT: Don't tell me what I misstated. You can

argue any place else you want.

MR. O'CALLAGHAN: I think you meant to say defense.

THE COURT: Counsel, please. The record speaks for itself.

Did Merex produce the documents that were requested in your letter? Yes or no?

MR. O'CALLAGHAN: No.

Fairchild is the party I believe you're referring to.

I had no idea, your Honor, --

THE COURT: I'm sorry. I didn't mean Merex.

Let me correct the record.

Did Fairchild produce the documents that were requested in your letter?

MR. O'CALLAGHAN: This is the correction I wanted to make, your Honor.

I had no idea what was in the sales inquiry file nor the pricing file. Fairchild produced documents in response to your endorsement to my letter in which they represented the documents produced were at the very least part, if not all, of those files.

However, they redacted the documents in substantial part at the time they delivered them. And they did not produce other documents within those files which were not produced until November of '88.

THE COURT: Did any of those documents that were not produced until November of '88 have anything to do with the statute of frauds issue?

MR. O'CALLAGHAN: One in particular, Mr. Egan, the controller's own handwritten note in which he wrote that he read at my deposition in December of '88 last year, which is cut out. I think that goes to the heart of this case. That's the kind --

THE COURT: Counsel, I'm not talking about the whole litigation, I'm talking very simply about the issues raised in

the statute of frauds motion.

MR. O'CALLAGHAN: That document was not produced, your Honor.

THE COURT: Mr. Klein, what is your response? Did you produce all of the relevant documents in the two files requested concerning the statute of frauds in response to the order on the 1986 letter?

MR. KLEIN: Yes, your Honor. We produced every document from the pricing file that referred to either Merex, Lachmann or the word "commission" in it. I'm not aware that the document Mr. O'Callaghan is identifying was not produced at that time. We had our paralegals go through the documents, and the instruction was that every document that mentioned Merex, Lachmann or the term "commissions" should be produced.

The sales inquiry file, as we told Mr.O'Callaghan at that time, although a witness had identified and described such a file, we could not locate any such file with that name, despite our due diligence. And so nothing at that time was produced called the "sales inquiry file." We produced every document we could find that was relevant to the issue of statute of frauds and that mentioned commissions, Lachmann or Merex.

THE COURT: All right.

MR. O'CALLAGHAN: That representation is inaccurate, your Honor. In the motion to the magistrate, by letter "S" and some asterisks here and there pointed out documents which were not produced at all in 1986 until '88.

THE COURT: Counsel, please, please.

What documents do you claim were not produced in response to the endorsement, as I have defined what that endorsement meant?

MR. O'CALLAGHAN: I have a listing, your Honor, in the reply affirmation. It's the documents --

THE COURT: What page, please?

MR. O'CALLAGHAN: I don't have that total document with me, your Honor.

THE COURT: Here it is.
(Pause)

MR. O'CALLAGHAN: If I might add to the record.

THE COURT: Lisa, could you get my glass inside?

MR. O'CALLAGHAN: If I might point out, your Honor -

THE COURT: No, counsel. Very simply, identify the documents that you allege that Fairchild did not produce.

MR. O'CALLAGHAN: There are two exhibits, 3-A, together with additional documents, Exhibit 13-A, produced only during and after November 1988.

THE COURT: What is 3-A?

MR. O'CALLAGHAN: 3-A and 13-A.

THE COURT: What is 3-A?

MR. O'CALLAGHAN: 3-A, your Honor, is a selection of documents that were not produced until after November of '88.

THE COURT: What is 3-A, in terms of a motion to dismiss based upon the statute of frauds?

MR. O'CALLAGHAN: The documents I identify with an "S," your Honor, are Pages 15 to --

THE COURT: Counsel, don't give me numbers. I am talking about your claim that Mr. Klein is misrepresenting a fact to this Court when he states that he with due diligence produced every document in his possession that related to the statute of

frauds claim.

You said he is not accurate. Then you told me that in your eighty-some-odd-page missive to Magistrate Buchwald, you identified documents he had failed to produce. Put it on the record, the documents he failed to produce, and tell me the relevance of those documents to the motion.

MR. O'CALLAGHAN: Your Honor, there is a listing from Pages 15 to Page 18.

THE COURT: Counsel, you will not do it that way. I will take every one of your claims, however long it takes. But you will tell me, claim by claim, and the relevance of the document to the motion that was before the Court.

MR. O'CALLAGHAN: Well, the first document identified was 109-S, April 3, 1984, letter. I don't have the exhibit with me. But my recollection is, -- I made a note about it -- the witness, Mr. Egan, testified about the use of letters of credit with the PRC in April of '84 that --

THE COURT: No, no, Counsel. Don't give me history, What relevance does Document 109-S have to proving that there was a written contract between the parties?

MR. O'CALLAGHAN: Your Honor, if I might say, I have never consented or conceded that the existence of a written contract between Merex and Fairchild was an issue that was a valid defense of Fairchild in the case. My position is --

THE COURT: I didn't ask you about your position.

You see, that's your problem, Mr. O'Callaghan. You are always litigating something in the periphery that you want to talk about. And you don't give one hoot about the issues that are actually before a court for decision, and I'm going to stop that.

MR. O'CALLAGHAN: The second --

THE COURT: I'm going to ask you one last time.

What documents justify your position this morning in

saying to me that Mr, Klein was not truthful when he stated to me this morning that he produced every document with due diligence in his possession or his client's possession concerning the statute of frauds motion?

That's the last time I'm going to ask you that. You are going to respond relevant to that question, or else that's the end of that inquiry, and we'll go on to something else.

MR. O'CALLAGHAN: One document, your Honor, --and I have numerous documents -- listed is 121-S.

THE COURT: Wait a minute, Mr. O'Callaghan. I'm going to repeat once again for the last time. I will not take a "totality of the evidence" response. You will be very specific. I don't care about numerous documents. But you will tell me what document and its relevance to the statute of frauds.

MR. O'CALLAGHAN: Okay. 121-S, I identified it on Page 15.

THE COURT: I don't care where you identified it. 121-S; is that correct?

MR. O'CALLAGHAN: That's right, your Honor.

THE COURT: All right. What is that document, first?

MR. O'CALLAGHAN: It is handwritten notes of Mr. Egan dated about April 9, 1984. That's from his testimony. And I had him read it and it said, "commission cut out." I think that's very relevant to this issue.

THE COURT: Just a moment. Who was Mr. Egan?

MR. O'CALLAGHAN: He is the controller of the company.

THE COURT: Now, what relevance does that have or did that have to the issues raised by the defendant's motion?

MR. O'CALLAGHAN: I believe that that document goes to the issue of whether or not there is a contract between Fairchild and the plaintiffs. I think that's a document right in the category of relevancy to that contractual relationship. I think it's an admission that there was an agreement.

THE COURT: Just a minute.
Mr. Klein, --

MR. KLEIN: Yes, your Honor.

THE COURT: -- was 121-S produced?

MR. KLEIN: Your Honor, I honestly say I don't recall if it was produced. If it is part of the pricing file, then certainly, it should have been produced at that time. If that particular document was part of the pricing file and was not produced at that time, then that was an oversight. Without comparing what was in the pricing file as of that date, I cannot say whether it was produced or
not.

THE COURT: Mr. Klein, next question: When did you produce that document to Mr. O'Callaghan?

MR. KLEIN: Well, your Honor, if it was not produced as part of the pricing file, it was produced in April of '86.
The next production --

THE COURT: Wait, Don't go too fast.
Mr. O'Callaghan, when did you receive 121-S?

MR. O'CALLAGHAN: Not until after November of '88.

THE COURT: When? When did you receive it?

MR. O'CALLAGHAN: December of '88, January of '89. It was not before.

THE COURT: Was it in either of those files that you

requested in the April of 1986 letter?

MR. O'CALLAGHAN: I think from the testimony of the witness that the answer is yes. That was my understanding of what his pricing file contained.

THE COURT: Sir, from the testimony of whom?

MR. O'CALLAGHAN: Mr. Egan.

THE COURT: And what did Mr. Egan say concerning the location of the document?

MR. O'CALLAGHAN: I presented to him every document in his pricing file, and he identified them. And then I presented to him documents which were not produced until November of '88, and he identified them as his. He only had one pricing file. I don't know what Fairchild -- if they took it out or put it in. I don't know.

THE COURT: Counsel, did Mr. Egan say in his deposition testimony that Document 198-S was a part of his pricing file?

MR. O'CALLAGHAN: I think you meant 121-S.

I have no recollection. I think it was the fair tenor of his testimony that that's where it was.

THE COURT: I'm not talking about fair tenor, because you and your brother at the bar --

MR. O'CALLAGHAN: I don't remember, your Honor.

THE COURT: -- do not agree on anything.

Well, what is the basis of your statement to me that 121-S was a part of the file that you asked to be produced and which I ordered to be produced?

MR. O'CALLAGHAN: Let me answer the question this way.

THE COURT: Not "this way." You answer the question the way I ask you.

MR. O'CALLAGHAN: Yes, your honor.
All documents produced in '86 were numbered.

THE COURT: Were what?

MR. O'CALLAGHAN: Numbered, Bates stamp numbered. This document was not produced until after November of '88 unnumbered.

THE COURT: Counsel, you have already made that representation.

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: But we are talking about a very narrow claim that you made to the magistrate, asking for sanctions against the defendants, alleging they had disobeyed the April 1986 order. And when I am pressing you now --

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: -- to tell me what the basis of that claim is, you have pointed to 121-S. And you are now alleging that Mr. Egan gave you reason to believe that 121-S was a part of the file that you requested in 1986 which was not produced by the defendants. That is the inquiry before me. And I am asking you, what is the basis of that statement?

MR. O'CALLAGHAN: Your Honor, they did produce the pricing file in '86 after they submitted the motion for summary adjustment [sic] in redacted form. Mr. Egan, my recollection was, his testimony was he had a pricing file and that these, among others, were the documents --

THE COURT: "These," meaning 121-S?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Did he say that 121-S was part of the pricing file that he turned over to his counsel?

MR. O'CALLAGHAN: I don't know, your Honor. I don't recall if he said that.

THE COURT: Well, how can you make the claim that you're making, if you don't know?

MR. O'CALLAGHAN: Because these were his documents. These were Mr. Egan's files. I don't know if the precise request was asked of him.

THE COURT: Mr. O'Callaghan, --

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: -- before you make allegations of lack of candor against a brother at the bar, it seems to me that you would make every effort to be precise and to exercise caution before you make an allegation deprecating the integrity of a fellow lawyer. That's where I start from.

Now, number two, Mr. Klein is the attorney for the defendant Fairchild. Mr. Klein was directed by me to produce all of the documents. And that was the reference to Rule 26, relevant to the motion that was pending before this Court, namely, the existence or nonexistence of a contract.

Now, if you are saying to the magistrate, "Sanction Mr. Klein, because he did not produce Document 121-S," it seems to me that before you would make such a claim against an attorney, you would determine in your deposition, number one, was 121-S a part of the pricing file that was turned over to counsel to comply with the orders? Where did 121-S come from? And if you don't know the answer to that, I take it with ill grace that you would stand before me, even today, and question the bona fides of Mr. Klein's statement.

MR. O'CALLAGHAN: Well, your Honor, I think the way I have to answer this is, I think we have a misunderstanding, or at least a disagreement.

THE COURT: Everybody has a misunderstanding with you, Mr. O'Callaghan. You tell me what the misunderstanding is.

MR. O'CALLAGHAN: My interpretation, I think a fair one, justifiable, of your order, "produce all relevant files," meant that Fairchild was to produce relevant files about the existence of a contract, whether verbal or written, between Fairchild and these plaintiffs.

THE COURT: That's correct.

MR. O'CALLAGHAN: And I think they withheld those documents.

THE COURT: Wait. Wait just a minute. That is correct. But that's not what you told the magistrate the order meant.

MR. O'CALLAGHAN: No -- Yes, it is. My position to the magistrate is that they withheld the documents. They redacted them.

THE COURT: Wait, wait. Wait just a minute. Now, look. You're on the record, and you're on the record purposefully. And I don't want you to make wild statements that you cannot support. Because when this case is over, I'm going to deal with these problems, because I do not countenance this type of litigation. And I want you to be careful.

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Your statement, your claim to the magistrate, was not that this order was limited to the production of the two files you requested in your letter that were relevant to the motion that was pending. That was not your claim to the magistrate.

MR. O'CALLAGHAN: I think that's a fair statement Because I don't believe Fairchild was limited to Rule 56(f) discovery. That order, as I read it, said Rule 26. Fairchild was always entitled to take full discovery.

THE COURT: Mr. O'Callaghan, throwing around numbers doesn't impress me. Rule 26, the reference in the order, was solely in reference to the business before this Court, namely, the motion to dismiss for statute of frauds reasons. And Rule 26 meant, in that limited context, all documents in the files that you had requested that were relevant to the statute of frauds issue. I told you I wasn't going to repeat that again. And that is not what you told the magistrate this Court meant by the order.

MR. O'CALLAGHAN: I think that the order, your Honor, standing directly in front of someone reading it directly and objectively, says Fairchild is to produce all their relevant documents pursuant to Rule 56 [sic]. That's the way I read the order, That's my understanding of its intention.

THE COURT: I will say that is a barefaced mischaracterization of the order, because the letter, in and of itself, made a request of the Court, and the endorsement was a response to the letter. And the internal evidence of the request and the response sets the parameters of what that endorsement meant.

Let's move on to the next issue.

MR. O'CALLAGHAN: It was also a representation in the order for a protective order. You suggested Fairchild could get a protective order. I would read Rule 26 in that context. They didn't seek a protective order to withhold these documents or to redact them.

THE COURT: Counsel, you have not on this record --

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: -- established to my satisfaction that the only document you have referred to that Fairchild did not produce was 121-S. And you have issued or given no support for your very flagrant statement that they deliberately withheld it.

Let's go to the next issue, the deposition of --

What is the name of the man?

MR. O'CALLAGHAN: Egan or Fanneron. Egan is the

controller or Fanneron is his assistant.

THE COURT: Mr. Fanneron's deposition.

The magistrate stated that it was to be one day, that Mr. Fanneron was to be deposed for one day.

What is the basis of your appeal from that order to this Court? In what way was that order erroneous?

MR. O'CALLAGHAN: I think it was erroneous, because I think, I believe, it's irrational to limit me. Bear in mind, I had sixty days of discovery four years ago, and follow-up for a few days.

THE COURT: Counsel, answer my question.

MR. O'CALLAGHAN: To answer your question, Mr. Fanneron appears to be, from these notes and pricing file, a very central witness to events. He has 123 pages of handwritten notes. I think to complete a deposition of that significance in one day is just -- anyone to ask that -- even Fairchild didn't ask that -- I believe that's just extraordinary and improper.

THE COURT: Counsel, I want to make two points.

Putting myself in the magistrate's place, knowing how you will blow something up out of all proportion, namely, the eighty-six-page document we've already talked about, if I were the magistrate, I would have considered it a very reasonable order to limit you to a time frame for a deposition, because, from your track record in this case, you could have deposed that man for two weeks.

Now, is there any reason for you to believe that if you in good faith asked questions on the deposition of this man and could not complete it in one day, that you would not have had the right to go back to Magistrate Buchwald and ask for additional time, based upon the fact that you could not in good faith have completed that deposition in one day?

MR. O'CALLAGHAN: I don't think I should be limited to one day. And I think that's what Fairchild wants, --

THE COURT: Counsel did --

MR. O'CALLAGHAN: -- delay. Delay is my concern, your Honor.

THE COURT: Counsel, did you hear the question that I asked you?

Apparently, you have some kind of problem. I don't know what it is.

Mary, please read back to Mr. O'Callaghan the question I just posed to him.

Listen to it, and respond to it.

(Record read)

THE COURT: Can you respond to that?

MR. O'CALLAGHAN: Yes, your Honor.

I believe that the magistrate's order memorandum is contrary to law and irrational.

And I believe, --

THE COURT: Look, Mr, O'Callaghan, --

MR. O'CALLAGHAN: -- in the context--

THE COURT: -- you've already made deprecating remarks concerning Mr. Klein. You're not going to include a magistrate. And I've already stated that the remarks you made concerning Mr. Klein are unfounded. Now, you've got to learn to control this tongue of yours.

I didn't ask you whether you considered it irrational or not. Magistrate Buchwald is one of the finest lawyers this court has ever had the pleasure to know. And she is not an irrational person.

MR. O'CALLAGHAN: I'm citing the law, which I think supports that position.

THE COURT: I asked you a simple question. You either respond to it -- And if you don't respond to it, I'm not going to let

you say what you want to say on this record.

Did you understand the question that was read back to you?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Respond to it.

MR. O'CALLAGHAN: In good faith, I think I would have difficulty going to Magistrate Buchwald, because it would mean more delay in the case.

THE COURT: Counsel, this case has been noted by its delay, because it has been litigation about sanctions, rather than moving the case forward for trial.

MR. O'CALLAGHAN: Might I address that, your Honor?

THE COURT: No, no, we're not going to go down that primrose path.

In other words, you tell me what delay would have been occasioned if in the afternoon of your deposition, you had called Magistrate Buchwald, called and said to her: "I have deposed Mr. Fanneron. I need an additional number of hours. Mr. Klein is here. He agrees that we have not wasted time, and we would like your permission to continue this deposition for another day or another number of hours."

Are You saying that that procedure would not have been available to you?

MR. O'CALLAGHAN: I would say, your Honor, I would submit that it would not occur with Mr. Klein. My experience has been in this case -- and the record, I believe, supports me -- of a series of motions provoked by the defendant to waste time.

THE COURT: Counsel, did you hear my question to you?

MR. O'CALLAGHAN: Yes, your Honor, I did.

The procedure might be available, I don't think --

THE COURT: Do you have any problems understanding and responding to issues presented to you?

MR. O'CALLAGHAN: I'm trying to respond, your Honor.

THE COURT: All right.

MR. O'CALLAGHAN: I think if --

THE COURT: My question was very simple. You said to me that you were concerned with delay. I asked you was there anything to prevent you from calling Magistrate Buchwald and asking for additional time. That's all I asked you.

What is your response?

MR. O'CALLAGHAN: I think it's more appropriate to grant me two days of discovery.

THE COURT: You are not the judge in this case, nor were you the magistrate. Magistrate Buchwald had the right to determine discovery schedules, not you.

MR. O'CALLAGHAN: There is nothing to stop me from asking the magistrate for additional time. I just think, from the very beginning, 123 pages of notes suggests it can't be done in one day.

THE COURT: That was your opinion. She had a different opinion. And she had the right to have her opinion. And if she did not prevent you from conducting further discovery or extending the time, I find it very difficult for you to appeal to me to overrule her decision on the grounds that it was erroneous.

MR. O'CALLAGHAN: I support myself on the statute, your Honor, which I believe gives me the right to request reconsideration. I think under the circumstances, to limit it to one day is really --

THE COURT: Mr. O'Callaghan, I am at my wit's end.

The statute, sir, only gives you the right to appeal from a magistrate's order to this Court based upon a claim that the magistrate was in error, as a matter of law. We have just discussed the fact that her discovery schedule of one day, without a restriction upon you to request further time, is not an error of law. Therefore, it is not an issue that I have any jurisdiction to rule upon on an alleged appeal from her order.

And I tell you now. The reason I referred this case to the magistrate to supervise discovery is because I do not have the time to do what I am doing here this morning, this back-and-forth picky, picky, picky business that goes nowhere. And you are not going to take this case out of Magistrate Buchwald's hands and have me supervise this discovery because you don't like Magistrate Buchwald's rules.

Now, let's go on to the next issue.

Let's talk about the future.

What discovery do you claim you have asked Magistrate Buchwald to provide you at this date that you have not yet been provided?

MR. O'CALLAGHAN: Well, as I addressed, your Honor, in the reconsideration, I certainly want to take Mr. Fanneron's deposition. He is the gentleman with the 123 pages of notes.

THE COURT: He is the gentleman that the magistrate gave you the right to depose.

MR. O'CALLAGHAN: Yes. So that's one issue.

THE COURT: That is not an issue. The magistrate decided it. She was not in error. That is not before me.

MR. O'CALLAGHAN: You misunderstood me, your Honor. I meant to say that is the additional discovery. That is one of the --

THE COURT: Well, you have not complied with her order. Don't tell me about it.

MR. O'CALLAGHAN: I sought reconsideration of the order, your Honor.

THE COURT: On erroneous grounds. You had no right to do it. And you're talking about delay.

MR. O'CALLAGHAN: I filed the reconsideration in June, your Honor.

THE COURT: Counsel, I have been on trial since June.

MR. O'CALLAGHAN: I understand, your Honor.

THE COURT: I am still on trial. And criminal cases take precedence over civil cases in this court.

MR. O'CALLAGHAN: Well, I'd like to take Mr. Fanneron's deposition. There was some --

THE COURT: Now, wait a minute. Wait a minute.

I asked you, is there any discovery that you have requested of the magistrate that she has denied which you need before the filing of the pretrial order in this case?

MR. O'CALLAGHAN: Your Honor, I requested some additional documents, and I paraphrased them in my reconsideration. They go to--

THE COURT: I'm not concerned with that. That is for the magistrate.

MR. O'CALLAGHAN: But she did not order it. She did not direct it.

THE COURT: If your answer is yes, did you make a request of the magistrate for those documents?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Did she direct the defendants to produce

them?

MR. O'CALLAGHAN: She did not direct the defendants to produce them. She didn't address the issue in her opinion.

THE COURT: Did you file a request for documents with the defendants? Yes or no?

MR. O'CALLAGHAN: Yes. I sought a document demand and by letter requested these documents and requested them at the deposition of Mr. Egan.

THE COURT: Did you receive the documents you requested?

MR. O'CALLAGHAN: No, your Honor.

THE COURT: Did you bring that issue before the magistrate?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: And are you saying to me Magistrate Buchwald did not resolve that issue?

MR. O'CALLAGHAN: She did not direct them to produce the documents.

THE COURT: I don't care how she resolved it.
I'm asking you, did she resolve the issue?

MR. O'CALLAGHAN: I don't know how to answer the question. She didn't direct the --

THE COURT: Mr. Klein, suppose you answer it as best you can.

MR. KLEIN: Your Honor, I don't recall Mr. O'Callaghan's motion papers requesting any further document production from Fairchild. He did have some informal requests

of Fairchild prior to the motion being made. I assume he had dropped those requests, because I don't recall them being in his motion papers. I think that's why there was no reference to it in the magistrate's decision.

MR. O'CALLAGHAN: They're referenced in the motion in Exhibit Request 17.

MR. KLEIN: This is your motion to reconsider?

MR. O'CALLAGHAN: No, in the motion to the magistrate, motion to the judge which went to the magistrate.
But I did reference the documents, your Honor.

THE COURT: What do you mean, you referenced the documents?

MR. O'CALLAGHAN: I gave a description of them.

THE COURT: Mr. Klein, look at what he's talking about.

MR. O'CALLAGHAN: I gave a description. It relates to Fairchild's profit on the sale.

THE COURT: What did you ask?

MR. O'CALLAGHAN: I asked that the documents be produced, and I asked the magistrate to direct that Fairchild produce them.

THE COURT: You first asked Mr. Klein to produce them?
MR. O'CALLAGHAN: Yes.

THE COURT: Mr. Klein, do you have any recollection of that?

MR. KLEIN: I do recall Mr. O'Callaghan asking, prior to all this motion practice, to produce documents concerning Fairchild's profit. My response at that time was that I didn't see how that was relevant at all to plaintiffs' claims. And my

recollection is that it was dropped at that point. I do not recall it being a specific request made of the magistrate in the motion papers. I may be wrong. If Mr. O'Callaghan can cite to a specific request in his motion papers directed to the magistrate, then I stand corrected on that.

THE COURT: All right.

MR. KLEIN: But it wasn't discussed in our telephone conferences with the magistrate. It certainly wasn't referenced in her memorandum and order.

MR. O'CALLAGHAN: I just referenced the paragraph and the exhibits.

I think the issue of the profit that Fairchild has made in this case is very significant to the plaintiffs, case, and there are --

THE COURT: Counsel, counsel, I am not presiding over discovery in this case. The magistrate is.

All right, in resolution of this appeal, I think the record shows that you had absolutely no grounds to appeal the magistrate's scheduling rule as to the depositions. I have said all I have to say about the magistrate's denial of sanctions. I agree with her conclusion, but for different reasons, which I don't have to again recite in this record.

This case is again referred back to Magistrate Buchwald for completion of discovery and pretrial order, with two addendums.

Number one. There will be no further motions for sanctions by either party in this case until after the Jury has rendered a verdict after trial. And at that time, this Court will decide what sanctions or other discipline is required, based upon the history of this litigation.

Number two. If there is any further motion practice in this case, the motion papers of both the plaintiff and the defendant will be no longer than ten pages. And for every page over ten pages, there will be a $10 assessment.

And if I ever see another eighty-six-page reply to a discovery motion, you can just multiply ten minus eighty-six leaves seventy-six, and that's $760. But you're entitled to be warned.

But that is a ruling that I am making on the record, and I intend to enforce it.

Gentlemen, go back to the magistrate. Act like lawyers.

MR. O'CALLAGHAN: Your Honor, can I ask for some clarification, please?

THE COURT: Yes, you may.

MR. O'CALLAGHAN: Can we have a deadline to conclude the discovery?

THE COURT: Sir, that is before the magistrate, not before me.

MR. O'CALLAGHAN: If I might address it. I'm very concerned that this case --

THE COURT: Mr. O'Callaghan, I don't know. Really, I've already said that I'm at my wit's end. I don't know how to communicate with you. I think I speak simple English.

You will not take the discovery in this case out of the hands of the magistrate and give it to this court. I have referred it to the magistrate. I expect my order to be obeyed. I expect all lawyers to act as lawyers, and not burden the magistrate, who is just as overburdened as this Court is. You will go back to the magistrate and obey her instructions concerning discovery and preparation of the pretrial order.

That is the end of this proceeding.

MR. O'CALLAGHAN: Your Honor, may I speak, please?

THE COURT: You still want to speak?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Go ahead.

MR. O'CALLAGHAN: On the point about the sanctions motion, I just want to clarify my understanding.

Am I correct that -- For example, plaintiffs have sought a Rule 56(g) motion, summary judgment motion, bad-faith affidavits of plaintiffs [sic], and you earlier would not permit me to make the motion. I just want to understand clearly that either during the trial or after the trial, the Court will permit me to make that motion, 56(g).

THE COURT: Mary, perhaps Mr. O'Callaghan doesn't understand me when I speak.

Would you please read to him, so he can hear it with your voice, -- maybe it will be clearer -- what my ruling was concerning motions dealing with sanctions?

MR. O'CALLAGHAN: The reason I ask --

THE COURT: Just listen to what was said, Mr. O'Callaghan.

Read Number 2.

(Record read)

THE COURT: Read Number 1.

(Record read)

THE COURT: Does that answer your question?

MR. O'CALLAGHAN: Yes, your Honor, I believe it does.

THE COURT: Have a good day, gentlemen.

ALL COUNSEL: Thank you.

THE COURT: Mr. Klein, I suggest you order these minutes, so that we won't have to replow this ground again.

- - -

APPENDIX J - N.Y. GEN. OBLIG. LAW §5-701(a)(10) (THE "STATUTE OF FRAUDS" OR THE "STATUTE")

N.Y. Gen. Oblig. Law §5-701(a)(10) provides in pertinent part:

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

(10) Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman.

APPENDIX K - 28 U.S.C., CODE OF FEDERAL REGULATIONS, "INTERNATIONAL TRAFFIC IN ARMS," PARTS 127, 130 ("ITAR")

SUBCHAPTER M -- INTERNATIONAL TRAFFIC IN ARMS

PART 127 -- VIOLATIONS, PENALTIES AND ADMINISTRATIVE REMEDIES

§127.01 Violations in general.

(a) It is unlawful to export or attempt to export from the United States any article or technical data for which a license or approval is required by this subchapter without first obtaining the required license or written approval from the Department of State.

* * *

§127.02 Misrepresentation and omission of facts.

(a) it is unlawful to use any export or intransit control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting any article or technical data for which license approval is required by this subchapter. Any false statement, misrepresentation or omission of material fact in an export or intransit control document will be considered, as made in a matter within the jurisdiction of a department or agency of the United States for the purposes of 18 U.S.C. 1001, 22 U.S.C. 2778 and 22 U.S.C. 2779.

(b) For the purpose of this section, the term export or intransit control document includes the following:

(1) Applications for export or intransit license and supporting documents.
(2) Shippers export declarations.
(3) Invoices.
(4) Declarations of destination.
(5) Delivery verifications.

(6) Applications for temporary export license.
(7) Applications for registration.
(8) Purchase orders.
(9) Foreign import certificates.
(10) Bills-of-lading.
(11) Air way bills.
(12) Consignee-purchaser transaction statements.
(13) Nth country control statements.
(14) Any other document used in the regulation or control of articles or technical data for which license or approval is required by this subchapter.

§127.03 Criminal penalties.

Any person who willfully--

(a) Violates any provision of section 38 or section 39 of the Arms Export Control Act (22 U.S.C. 2778, 2779), or any rule or regulation issued under either section; or

(b) In a registration, license application or report required by section 38 or section 39 of the Arms Export Control Act (22 U.S.C. 2778, 2779) or by any rule or regulation issued under either section, makes any untrue statement of a material fact or omits a material fact required to be stated therein or necessary to make the statements therein not misleading--

shall, upon conviction, be subject to fine or imprisonment, or both, as prescribed by 22 U.S.C. 2778(c).

* * *

PART 130 -- INFORMATION ON POLITICAL CONTRIBUTIONS AND FEES OR COMMISSIONS IN CONNECTION WITH THE SALE OF DEFENSE ARTICLES OR SERVICES

§130.01 Definitions.

For the purposes of this part:

(a) "Applicant" means any person who applies to the Office of Munitions Control, Department of State, for any license or approval required under this subchapter for the export of defense articles or defense services valued in an amount of $100,000 or more which are being sold commercially to or for the use of the armed forces of a foreign country or international organization. This term also includes a person to whom the required license or approval has been given.

* * *

(f)(1) "Fee or commission" means, except as provided in paragraph (f)(2), any loan, gift, donation or other payment of $1000 or more made, or offered or agreed to be made, directly or indirectly, whether in case or in kind, and whether or not pursuant to a written contract, which is:

(i) To or at the direction of any person, irrespective of nationality, whether or not employed by a [sic] affiliated with an applicant, a supplier or a vendor; and

(ii) For the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles or defense services to or for the use of the armed forces of a foreign country or international organization.

* * *

§130.11 Obligation to furnish information to the Office of Munitions Control, Department of State.

(a)(1) Each applicant shall inform the Office of Munitions Control, Department of State, as to whether applicant and/or its vendors have paid, or offered or agreed to pay, in respect of any sale for which a license or approval is requested:

(i) Political contributions in an aggregate amount of $5,000 or more, or

(ii) Fees or commissions in an aggregate amount of $100,000 or more.

If so, applicant shall furnish to such office the information specified in §130.12. The furnishing of such information or an explanation satisfactory to the Director of the Office of Munitions Control why all the information cannot be furnished at that time shall be a condition precedent to the granting of the relevant license or approval.

(2) The requirements of this paragraph shall not apply in the case of an application with respect to a sale for which all information specified in §130.12 which is required by this section to be reported shall already have been furnished.

* * *

§130.12 Information to be furnished to the Office of Munitions Control, Department of State.

(a) Every person required under §130.11 to furnish information specified in this section in respect of any sale shall furnish to the Office of Munitions Control, Department of State:

(1) The total contract price of the sale to the foreign purchaser;

(2) The name, nationality, address and principal place

of business of the applicant or supplier, as the case may be, and, if applicable, its employer and title;

(3) The name, nationality, address and principal place of business, and, if applicable, employer and title of each foreign purchaser, including the ultimate end user, involved in the sale;

(4) Except as provided in paragraph (c) of this section, a statement setting forth with respect to such sale:

(i) The amount of each political contribution paid, or offered or agreed to be paid, and/or the amount of each fee or commission paid, or offered or agreed to be paid;

(ii) The date or dates on which each reported amount was paid, or offered or agreed to be paid;

(iii) The recipient(s) of each such amount paid, or intended recipient(s) if not yet paid;

(iv) The person(s) who paid, or offered or agreed to pay such amount; and

(v) The aggregate amounts of political contributions and of fees or commissions, respectively, which shall have been reported.

(b) In responding to paragraph (a)(4) of this section, the statement shall:

(1) With respect to each payment reported, state whether such payment was in cash or in kind, and if in kind, include a description and valuation thereof (where precise amounts are not available because a payment has not yet been made, an estimate of the amount offered or agreed to be paid shall be provided);

(2) With respect to each recipient, state:

(i) Its name;

(ii) Its nationality;

(iii) Its address and principal place of business;

(iv) Its employer and title; and

(v) Its relationship, if any, to applicant, supplier, or vendor, and to any foreign purchases [sic] or end user.

(c) In submitting a report required by §130.11, the detailed information specified in paragraphs (a)(4) and (b) of this section need not be included in the case of payments which do not exceed:

(1) $2,500 in the case of political contributions; and,

(2) $50,000 in the case of fees or commissions.

* * * *

APPENDIX L - FRCP RULE 16(e)

Rule 16. Pretrial Conferences; Scheduling; Management

* * *

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

APPENDIX M - FRCP RULE 39

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the

same effect as if trial by jury had been a matter of right.

APPENDIX N - FRCP RULE 56(g)

Rule 56. Summary Judgment

* * *

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expense which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX O - TRIAL EXHIBITS
MEREX'S EXHIBIT 27
MEMORANDUM TO MR. MERTINS, SR., DATED AUGUST 24, 1982

M E R E X *Corporation*

PAGE:

TO: Mr. Mertins DATE: August 24, 1982

1) Fairchild Western (N.Y.) - Mr. Neasham (516) 349-2496
Telex: 510-221-1859

Fairchild Western needs telex from GGM (Merex) requesting F.W. to prepare proposal for certain customer. Also requesting five systems, two LORAP cameras, one MTRF.

Needs contract terms, conditions, time of delivery.

(Contract between Fairchild and distributor. State Department will need EUC). F.W. asking State Dept. for advisory.

Fairchild will follow with training, techn.

Mr. Neasham said that message could be given to either Mr. Mertins or Mr. Brockdorff.

Message transmitted to Mr. Brockdorff. Said that telex will be sent to Fairchild after meeting tomorrow.

* * *

APPENDIX O - MEREX'S EXHIBIT 163 HANDWRITTEN LETTER OF INTENT, ADDRESSED TO UNITED STATES DEPARTMENT OF STATE, MUNITIONS CONTROL BUREAU FROM PEOPLES REPUBLIC OF CHINA

Date

~~FAIRCHILD SPACE AND DEFENSE SYSTEMS~~
~~A DIVISION OF FAIRCHILD CAMERA AND INSTRUMENT CORPORATION~~

The Government of the United States of America
Department of State
Munitions Control Bureau
Washington 25 D.C., USA

Gentlemen,

The Peoples Republic of China intends to purchase from FAIRCHILD Weston Systems Inc. 300 Robbins Lane, Syosset New York 11791 a quantity of approximately (5) five LONG RANGE AERIAL PANORAMIC photograph systems. Each system will include (2) LORAP KA112A CAMERAS, (2) especially designed aerial photographic pods and ancilliary ground support equipment and spares and (1) ONE MTRF (Mobile Transportable Photographic Facility) consisting of three vans (1) Photolab films; (2) Photolab reproduction; (3) Photographic Interpretation Lab.

The purpose of this letter of intent is to request official sanction for this purpose from the USA Department of State and to permit the transfer of necessary technical DATA from FAIRCHILD Weston Systems Inc. to the Peoples Republic of China. This Letter is not a commitment to the proposed sale of all or any of the systems described above.

MEREX'S
EXHIBIT
163

Very truly yours,

_____
TITLE
Peoples Republic of China

APPENDIX O - MEREX'S EXHIBIT 164 LETTER FROM ZHAO FEI OF CHINA NORTH INDUSTRIES CORPORATION (NORINCO) TO MR. ROBERT NEASHAM, DATED NOVEMBER 19, 1982

China North Industries Corporation

ATTN. MR. ROBERT NEASHAM

Yua Tan Nan Jie No. 7A
Beijing/China
Telephone
Telex 22339 CNIC CN
PO Box 2137

NORINCO

Ref. **Date** Nov. 19, 1982

Dear sir,

Through the discussions with your colleagues in Beijing, the freindship **[sic]** beteen **[sic]** us has been strengthened than before and we have a better understanding each other, especially about the long range aerial panoramic photographic system with ancilliary ground suppot **[sic]** equipment.

We intend to purchase from Fairchild Weston Systems Inc., 300 Robbins Lane, Syosset New York 11791, USA, a quantity of Long range aerial panoramic photographic systems. Each system will include 2 (two) LORAP KA 112A cameras, 2 (TWO) especially designed aerial photographic pods, ancilliary ground support equipment and spares, engineering support and training, 1 (one) MTRF (mobile transportable photographic facility) consisting of three vans (1. photolab filmprocessing, 2. photolab reproduction, 3. photographic interpretation lab). The number of systems will be determined as a result of further technical discussions of both parties.

MEREX'S
EXHIBIT
164

016100

This letter is not a commitment to the proposed sale of all or any of the systems described above.

Hoping that you send your engineers at an appropriate time to China for futher [sic] detailed technical exchange and for the possibility of transferring the technical data from Fairchild Weston.

Truly yours

Manager, Zhao Fei

SEAL
/Signature
NORINCO
China

016101

APPENDIX O - MEREX'S EXHIBIT 503 LETTER FROM C. REDANZ OF FAIRCHILD TO OFFICE OF MUNITIONS CONTROL DATED DECEMBER 10, 1982

FAIRCHILD WESTON SCHLUMBERGER

FAIRCHILD WESTON SYSTEMS INC.
SYOSSET, NEW YORK

10 December 1982
CR/12-490

Office of Munitions Control
PM/MC,Rm. 800, SA-6
Department of State
Washington, D,C, 20520

Attention: Mr. J. Sanford

Subject: Application/License, Peoples Republic of China

Reference: MC Case Nos. 154858 and 163693

Enclosure:
A) Form DSP-5 Application/License
B) Norinco Letter of Intent, 11/19/82
C) ED-DA-30 MTRF Specification
D) ED-EB-84/ED-DC-30/ED-DB-84, all dated 12/1/82

Gentlemen:

Fairchild Weston Systems Inc., through its Imaging Systems Division, submits herewith its application to cover shipment of the items requested by enclosure B), and delineated under Item 9 of enclosure A). Enclosures C) and D) represent the technical specifications and operating parameters of the MTRF/LORAP Systems. Both the MTRF and LORAP Systems were developed solely with Fairchild funds.

MEREX'S
EXHIBIT
503

FAIRCHILD SYSTEMS

Fairchild is not under obligation to any government agency to manufacture this equipment.

The full information required under para. 130.12 of the International Traffic in Arms Regulations cannot be provided at this time since we have not concluded our negotiations. Such information will be provided as soon as it becomes available. Interim information available at this time is provided as required by paragraphs 130.11 and 130.12.

Para. 130.11(a)(1) - You are advised that no political contributions have been made in connection with this transaction, but a commission estimated to be approximately 6% of the contract value will be paid.

Para. 130.12(a)

(1) Total contract price to be negotiated.

(2) Fairchild Weston Systems Inc.
300 Robbins Lane
Syosset, New York 11791
Mr. C. Lay
Vice President, Regional and International Marketing
Citizen of the United States of America.

(3) Merex AG Hong Kong Branch, 12A Broadway ST1-F
Mei Foo Sun Chuen
Kowloon, Hong Kong
Telephone 3-743464
Mr. S.Y, Lee
They are the purchaser. The end user will be Chinese Air Force, Peoples Republic of China
005034

(4) i) No political contributions are involved. A commission of 6% has been agreed to for enclosure B).

ii) This information to be supplied pending contract signing.

005034

iii) The intended recipient of the commission is our representative, Peter C. Lachmann C/O Plitraco
P.O. Box 122
8029 Sauerlach
West Germany

iv) Commission will be paid by Fairchild's Controller, Mr. Charles Fanneron.

v) Representative has advised verbally that no political contributions or fees will be paid. He will confirm this by letter which will be forwarded when received.

The parties concerned consider the above information to be confidential business information in accordance with para. 13O.31.

Should you require additional information, please contact the undersigned at 516-349-2637.

Very truly yours,

/Signature
C. Redanz
Contract Administrator

lg
Enc.

005035

Inputs to Charles Wagner (DOD) from other DOD reviewers re Application #185078

---

1. EK 3412 is a first-line USAF film. It cannot be released to China.

2. Camera represents an advanced engineering application of most current technology in lens, AEC, and high-resolution film. Forty-mile range results in quantum increase in strategic imagery and intelligence capability. Can provide photo reconnaissance of Taiwan without flyover. Therefore, due to technology involved, advance in intelligence-gathering capability and resultant threat to U.S. allies, we would recommend denial.

3. There is a presidential directive concerning China which states that strategic weapons systems and intelligence-gathering capability may not be supplied.

4. Secretary Schultz is visiting China this week. He will discuss outstanding export license applications with the Chinese. Therefore, it behooves us to respond SAP to these adverse comments.

I told Wagner we'd probably respond tomorrow. He advises we call back this PM with status of response.

003006

APPENDIX O - MEREX'S EXHIBIT 83
TELEX FROM
STEVE WAHL TO MR. CHRIS A. LAY,
AT BEIJING HOTEL, BEIJING, CHINA,
DATED APRIL 4, 1984

04/85 07:43
22426 BHCTL CN

FCIEOS, NY SYEYT
MSG. NO. 853
TWX NO. 510-221-1859

APRIL 4, 1984

BEIJING HOTEL
BEIJING
CHINA'

ATTN: MR. CHRIS A. LAY, HOTEL GUEST
ROOM 1131

FROM: STEVE WAHL

RE: CLAUSE 22

PER OUR TELECON RE CLAUSE 22 I HAVE DRAFTED THE FOLLOWING CHANGE TO CLAUSE 22.
I HAVE ALSO PROVIDED A SECOND ALTERNATIVE FOR DELIVERY ALONG THE LINES ORIGINALLY CONTEMPLATED, THAT IS, DELIVERY OF THE FIRST CAMERA, POD AND MTRF IN SYOSSET. JUST PLUG IN PARAGRAPH 22.5, SECOND ALTERNATIVE, EVERYTHING ELSE REMAINS THE SAME, IF YOU SO CHOOSE. AS YOU KNOW, THE SECOND ALTERNATIVE IS HIGHLY DESIRABLE FROM A CASH FLOW DELIVERY VIEWPOINT.

ONE WORD OF CAUTION. SEVERAL BLANKS HAVE BEEN LEFT FOR DATES TO BE INSERTED THAT ARE KEYED TO

THE CONTRACT DATE ON PAGE 4 OF THE RED BOOK.

THERE ARE A FEW CHANGES THAT SHOULD BE MADE TO THE RED BOOK TO REFLECT CONTRACT DIRECTLY BETWEEN FWSI/PRC. I WILL TELEX CHANGES REQUIRED TOMORROW.

FINALLY, PRICES REFLECTED BELOW IN CLAUSE 22 INCLUDES ONLY LACHMANN.

FANNERON WILL BE IN TOUCH RE SPECIFICATIONS.

I'M SURE AN OLE WESTPOINTER WELL FED ON GOOD FOOD AND FINE TEA WILL BE ABLE TO FIGURE ALL THIS OUT.

ANY QUESTIONS CALL (516) 349-2601

REGARDS,
STEVE WAHL

CLAUSE 22= = = = = = = =

MEREX'S
EXHIBIT 008327
-83-

APPENDIX O - MEREX'S EXHIBIT FAIRCHILD INTERNAL MEMORANDUM FROM C. REDANZ TO C.A. LAY, DATED APRIL 6, 1984

FAIRCHILD SYSTEMS INTERNAL COMMUNICATIONS
Syosset, New York

CR/4-709 Contracts Dept.

To: C.A. Lay
cc: L. Bailey
L. Pighi
S. Wahl

Subject: Project Anna - Export License
From: C. Redanz 6 April 1984

Reference: Munitions Control License No. 185078 "Project Anna"

I spoke with Mr. Suchinsky, Deputy Chief of Munitions Control, Department of State, today. Our discussion covered renewal of the referenced license which expires 9 August 1985. He agrees that renewal should be processed as the unshipped balance of MC185078. Under this procedure, the licensing officer of the Arms Licensing Division need only reissue as a routine case.

lg

/Signature
C. Redanz

[Handwritten note:]
Charlie --
Good - let's do it
Chris

APPENDIX O - MEREX'S EXHIBIT 83(a)
TELEX FROM CHRIS LAY/A. ARENA OF
FAIRCHILD TO
ZHAO FEI OF NORINCO,
DATED MAY 14, 1984

WUTCO 84
71622339+
FCIEOS NY SYET
8159071 EST 1630 MAY/14/1984
22339 CNIC CN

FCIEOS NY SYET
MSG. NO. 256
TWX NO. 510-221-1859

MAY 14, 1984

FROM: C. LAY
A. ARENA
FAIRCHILD WESTON SYSTEMS INC.

TO: ZHAO FEI
NORINCO

AT THE REQUEST OF MR. NEASHAM, WE ARE FORWARDING TO YOU THE INFORMATION BELOW.

THE FOLLOWING IS A LIST OF THE ADVANTAGES OF FAIRCHILD WESTON SYSTEMS INC. KA-112A CAMERA SYSTEM VS. THE CHICAGO AERIAL KS-1461 SYSTEM.

* * *

ON MAY 16 WE WILL SEND YOU BY DHL THE PROJECT ANNACONTRACT, MODIFIED BY AGREEMENT BETWEEN US DURING MY RECENT VISIT. ALL THAT IS MISSING ARE SIGNATURES TO MAKE IT EFFECTIVE.

* * * * *

CHRIS LAY/A. ARENA
FAIRCHILD WESTON SYSTEMS INC.

MEREX'S
EXHIBIT 83(a) 008301

APPENDIX O - MEREX'S EXHIBIT EXCERPTS FROM CONTRACT BETWEEN FAIRCHILD AND POLY TECHNOLOGIES AND NORINCO, DATED AUGUST 27, - SEPTEMBER, 1984

A CONTRACT

BETWEEN

POLY TECHNOLOGIES, INC.

AND

FAIRCHILD WESTON SYSTEMS INC.

[Handwritten:]

CONTRACT NO. 84PL-1023MR

004125

* * *

REV. A - 27 AUGUST 1984

CLAUSE 2

ADDRESSES AND NOTICES

2.1 The legal addresses to which correspondence and notices are to be sent are as follow:

Buyer: POLY TECHNOLOGIES INC.
BEIJING HOTEL, FRIENDSHIP HALL NO. 1
BEIJING, CHINA
TELEX NO.: 22010 POLY CN

NORINCO -
CHINA NORTH INDUSTRIES CORPORATION
YUE TAN NAN JIE NO.7A
BEIJING, CHINA
TELEX NO.: 22339 CNIC CN

Seller: FAIRCHILD WESTON SYSTEMS INC.
300 ROBINS LANE [sic]
SYOSSET, NEW YORK 11791, U.S.A.
TWX NO. 510-221-1859

* * *

/Signature
[Zhao Fei]

APPENDIX O - MEREX'S EXHIBIT 300 LETTER FROM FAIRCHILD TO OFFICE OF MUNITIONS CONTROL UNITED STATES DEPARTMENT OF STATE, DATED, OCTOBER 12, 1984

FAIRCHILD
WESTON
SYSTEMS INC.

12 October 1984

Office of Munitions Control
PM/MC, Room 800, SA-6
Department of State
Washington, D.C. 20520

Attention: Mr. A. Suchinsky

Subject: MC 185078 - Peoples Republic of China

Reference: Fairchild letter CR/12-490, 10 Dec. 1984 [sic]

Enclosure: Contract No. 84PL1023MR/6826/27/28

Gentlemen:

On August 8, 1984, Munitions Control issued the referenced license to Fairchild, authorizing shipment of the LORAP/MTRF Camera System with ancillary equipment, technical services, and manuals to the Peoples Republic of China. Issuance of the subject license was predicated on a letter of intent received from NORINCO, a government controlled agency.

From the inception date of this license, Fairchild has been negotiating with cognizant Chinese Air Force personnel to conclude a final contract, On August 27, 1984, Fairchild was successful in negotiating and executing such a contract, a copy of which is enclosed with this letter.

MEREX'S
EXHIBIT
300

In reviewing, you will note that this contract differs from the original Letter of Intent in total dollar value, line item values, quantities, and in some cases it combines or separates previously listed items. As a result, it is requested that the subject license be revised to reflect the final negotiated contract, i.e., changes to Item 4, to reflect JFK and/or Port of New York; Item 8, Quantities; Item 9, Commodity Descriptions; Item 11, Value; Item 16, Consignor in U.S.; Item 17, Foreign Consignee; Item 19, Foreign Intermediate Consignee. In compliance with Part 130, para. 130.9 of ITAR, you are advised that neither Fairchild nor its vendors have paid, offered or agreed to pay political contributions or fees in connection with this transaction, but a Commission of 1 1/2% of the contract value will be paid. The information required by para. 130.10 (a) is furnished below:

(1) Total Contract Price is $20,300,000.00

(2) Fairchild Weston Systems Inc,
Fairchild Imaging Systems Division
300 Robbins Lane, Syosset, New York 11791
Mr. C. Lay, Vice President, Regional and International Marketing

(3) Poly Technologies, Inc., Beijing Hotel, Friendship Hall No. 1, Beijing, China, is the sole purchaser. The end user is the Peoples Republic of China - Chinese Air Force.

(4) (i) No political contributions or fees involved. A commission of $304,500 has been agreed to.

(ii) The commission was agreed to on 22 September 1984. It will be paid by checks in the following manner: Pro rata to Fairchild's-payment under the contract and the letter of credit. Date of first payment will be December 1984; date of remaining payments will be periodically starting March through December of 1986.

(iii) The recipient of the above payment is:

Poly Technologies, Inc.
Beijing Hotel, Friendship Hall No. 1
Beijing, China
Telex No.: 22010 POLY CN

(iv) Mr. Charles Fanneron, Fairchild's Controller, authorizes payment of commissions.

(v) No other payments are to be authorized or reported, therefore, the aggregate amount is $340,500.

Para. 130.10 (b)

(1) Payment will be by check.

030017

(2) Same as (iii) above

(ii) Chinese

(iii) Same as (i) above

(iv) Mr. H.E. Ping, President

(v) Fairchild's Representative in P.R.C., a government controlled agency of P.R.C.

Both Fairchild and the Purchaser advise that they consider-the information provided herein to be confidential business information.

Very truly yours,
/Signature
C. Redanz
Contract Administrator

CR/im

030018

APPENDIX O - MEREX EXHIBIT 001-A
FAIRCHILD PROGRAM BUDGET RELEASE,
DATED OCTOBER 22, 1984

FAIRCHILD WESTON SYSTEMS INC.
PROGRAM BUDGET RELEASE

Customer	Poly Technologies, Inc.	**Date**	October 22, 1984
Description	2 LORAP/MTRF Systems	**Job No.**	Camera 6826***
Contract Type	F.P.	**Program Mgr.**	Fred Ratowsky

		Total	
HOURS:	***	***	
LABOR:	***	***	
OVERHEAD:	***	***	
MATERIAL:	***	***	
Total Mfg. Cost		12,592,181	
***		***	POLY TECH 1½% - 304,500
G&A	23.8%	3,153,708	Y.A. LEE 7500 x 36mos. - 270,000
Total Cost		16,404,583	P. LACHMANN 40,000
Profit & C/B	20%	3,280,9177	* 614,500
Sales Price		19,685,500	
Commission		* 614,500	
Sales Price		**$ 20,300,000**	

APPROVALS: */Signature* */Signature* */Signature*
Cost/Pricing Mgr. Business Mgr. Division Director
(Over $1 million) */Signature[T.Egan]* */Signature*
Controller Vice President

APPENDIX P - EXCERPT FROM TRANSCRIPT OF DEPOSITION OF FAIRCHILD BY THOMAS EGAN, DATED DECEMBER 20, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN,
Plaintiffs,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant.

85 Civ. 6596 (MJL)

Continued deposition of defendant FAIRCHILD WESTON SYSTEMS, INC., by THOMAS EGAN, taken by plaintiffs pursuant to notice, order and agreement, at the offices of Daniel J. O'Callaghan, Esq., 230 Park Avenue, New York, N.Y. 10169, on December 20, 1988, at 9:45 a.m., before Robert M. Levine, a Shorthand Reporter and Notary Public of the State of New York.

Blitz Reporting Corp. 5 W. 37th St., N.Y.C. 10018
(212) 986-6622

* * * *

Q. I'll keep you one more minute because this last document is in this series.

If you look at 121-S, can you identify 121-S?

A. Not really, it's in my writing.

Q. It's your handwriting?

A. It is in my handwriting. It looks like all it was recap of how much engineering and manufacturing in terms of labor hours was in the price.

Q. At this time, the price was computed to be what?

A. 23,632,000. [P. 310]

* * *

Q. In the middle of the page, 121-S there's a line drawn and some words below it. Would you read the words in your handwriting?

A. "Commission - cut out." [P. 312]

* * * *

[Egan Handwritten:] Project Anna

Price of 24,681

Reductions	
Engr.	***
D&D	***
Tech.	***
Mfg.	***
Value	$1,050
	23,632

Comm. - Cut-out

121-S

APPENDIX Q - FAIRCHILD PRICING FILES, EXCERPT, APRIL 4, 1984

"Anna" 2 Systems	**4/4/84** CF
Manufacturing Cost ...	13,600
Warranty	***
G&A	***
Total Cost	***
Contingency 10%, Profit 30%	7329
Lachmann 2%	500
Merex/Lee	1000
Red Book Prices 2/9/84 (Excludes Merex commission)	26278

* * *

Rockbottom Computation

* * *

Profit @ 30%	4860
6%	1340
R.Bottom Price	**22400**
To C.A. Lay	**25000** [Handwritten Egan/Fanneron]

* * * *

APPENDIX Q
EXCERPT, APRIL 4-5, 1984

"Anna" 2 Systems **4/4/84** CF
Meeting with L.Pighi,
T. Egan, C.Fanneron
4/5/84

Manufacturing Cost...		13,600
Warranty		***
G&A		***
Total Cost		***
Contingency 10%		
Profit 30%,	43%	7329
Lachmann 2%		500
Lee & Merex		1000
Red Book Prices 2/9/84		26,278
(excludes Merex commission)		

Rock Bottom per L. Pighi **4/5/84**

Mfg. Cost above	13800
***	
***	
30% Profit/contingency	4939
Lachmann,Lee,Merex	
6% of 23,000 sell price	1380
	22,782

L. Pighi guideline to Chris (**4/5/84**)
including 6% of Sell Price to
Lachmann, Lee, Merex 25,000

[Fanneron
Handwritten]
020043-A

APPENDIX Q
EXCERPT, APRIL 9, 1984

CUSTOMER:	CLASSIFIED	JOB NO.:	
PROGRAM:	LORAP/MTRF	DATE:	04/09/84
SALES INQ NO.:	4290-017A8	RATE PERIOD:	**

---SUMMARY---

* * *

ENGINEERING	PRODUCTION
***	***
OPTICAL	QUALITY ASSURANCE
***	***
COST OF MONEY	MATERIAL
***	***
	O.D.C.
	***

TOTAL SALES PRICE $23,632,430

TOTAL MFG. COST		$12,134,600
WARRANTY	@ %	364,038
TOTAL MFG. COST		$12,498,638
G/A	@ 23.60%	2,949,678
TOTAL COST		$15,448,316
COST OF MONEY		132,451
FEE/PROFIT	@ 52.12%	8,051,663
TOTAL SALES PRICE		**$23,632,430**

000120-S

APPENDIX Q
EXCERPT, APRIL 10-11, 1984

Anna - 2 Systems **4/10/84**

***		
Mfg. Cost		12,786
Warranty		***
G&A		***
Profit	31%	4902
Lachmann, Lee, Merex		
6% of Sell		1320
Sell Price		22,000

Per LHP - **4/11/84**
Budget @ 12.0 Mill before Warranty & G&A

***		Budget within
***	G&A	30 days
5.9	Profit	Stretch Purchasing
***		to minimize cash
1.3	Comm.	flow/ROI
22.0		

[Fanneron Handwritten]

20041-A

APPENDIX Q
EXCERPT, APRIL 10-11, 1984

Anna - 2 Systems **4/10/84** CF

Per **4/11/84** Meeting
L.H.P., T. Egan,
C. Fanneron
Budget shall be

Mfg. Cost		12,000
***		***
G&A		***
Profit	31%	5857
Lachmann, Lee, Merex		
6% of Sell		1320
Sell Price		**22,000**

* * *

[Fanneron
Handwritten]

20042-A

APPENDIX Q
EXCERPT, APRIL 24, 1984

4/24/84 CF

Fairchild "Negotiation Trail"

Chris Lay says that his agreement with China is for 21,078K and is valid for a period of 60 days (to approximately June 15, 1984).

The negotiation trail follows:		Chicago
2/6/84 prices for two systems	26,278	
***		
Chinese advise Chris that Chicago quoted ***		17,850
[Lay Reductions]		
	21,678	
The Chinese then objected to price for in country items...***		[Fanneron
[Lay Reductions]		Handwritten]
	21,079	

Anna 2 Systems per **4/11/84** meeting L.H.P., T.Egan, C. Fanneron, Budget shall be		**4/24/84** CF per **4/24/84** meeting L.H.P., C. Lay, T.Egan, C. Fanneron, Budget shall be	
Mfg. Cost	12000		11900
Warranty	***		***
G&A	***		***
Profit 39.5%	4902	40.5%	5955
Commission Lachmann,Lee, Merex 6% of Sell	1320	2%	422
Sell Price	**22000**		**21079**
Assume 9/1/84 Start per L.H. P. 2% commission Maintain 31% fee		[Fanneron Handwritten]	20038-A

APPENDIX Q
EXCERPT, MAY 17, 1984

Anna 5/17/84 CF

Pre-budget based on 6/1/84 award prime

per L. Pighi assume 9/1/84 start

***

Mfg. Cost - Prime		12,778	12,249
Warranty		***	***
G&A		***	***
Profit	31%	4888	4689
Commission		2% 422	6% 1265
Sell Price		**21,079**	**21,079**

[Fanneron Handwritten]

20033-A

APPENDIX Q
EXCERPT, MAY 22, 1984

5/22/[84]

Anna Meeting

L.H.Pighi
C.A.Lay
C. Fanneron

	21079		SY Lee
	429	2% Comm.	Merex
	***		Lachmann

use 20500 vs. 220 mill. Quote

Budget for Job per LHP...

0084

[Egan
Handwritten]

APPENDIX Q
EXCERPT, SEPTEMBER 12, 1984

Anna

CA Lay Telecon **9/12/[84]**

* * *

Competition

Chinese sending out feelers to get evaluation of what Price should be - CAI not standing by [Chicago Aerial]

[Fanneron Handwritten]
00136-S

APPENDIX Q
EXCERPT, [SEPTEMBER, 1984]

Commissions/ Fees to be paid on Anna

$40 K - P. Lachmann	Finders Fee
270 K - YA Lee	Consultant Expense 7500 per mo. x 36 mo. = 270K (to start in Nov. '84)
304.5K - Poly Technology	1½ Commission due the Agency (Poly Tech) that acts as the Chinese Gov't's purchasing Agent - mandated by terms of the contract

* * *

[Egan Handwritten]

0072-A

APPENDIX R - TRANSCRIPT EXCERPT APRIL, 1992 TRIAL, (MERTINS, SR.'S ILLNESS)

Mertins, Sr. - Cross

Q. But during 1983 and 1984 you personally weren't involved in any direct dealings with the Chinese on this project, were you?

A. I was not travelling this year so much as always as I was --

THE COURT: What is the answer, Yes or No?

THE WITNESS: This year I was not so --

THE COURT: Yes or No? Did you?

THE WITNESS: No, if you want no, no. R.511

Q. You weren't at Fairchild in November of 1983 when the Chinese sent technical people to meet several weeks, were you?

A. Yes, I was there.

Q. You were there during that whole period of time?

A. Yes...

Q. You weren't in China in early April, 1984, were you?

A. I can't recall...yes, I remember when my son was there.
R. 512-13.

Q. ...[W]here was your father at this time?

A. I believe he was in Germany.

Q. Was he invited to this meeting?

THE COURT: What meeting?

MR. KLEIN: Objection.

Q. The meeting with Mr. Lay.

THE COURT: Next question, counsel. That's over and done with. Now, what's the next question?

Q. Did your father attend the meeting, in any of these meetings I heard in this trip in China?

A. Not in April of 1984.

Q. Do you know why?

A. Prior, due to his health.

THE COURT: Counsel, didn't I sustain an objection about that before?

MR. O'CALLAGHAN: I didn't ask him about his health, your Honor, I just asked him why his father didn't attend.

THE COURT: Didn't you know what he would say?

MR. O'CALLAGHAN: No, your Honor. I didn't know what he would say because I didn't know myself until now why his father didn't attend.

THE COURT: Next question.

APPENDIX S - TRANSCRIPT EXCERPT, APRIL, 1992, TRIAL, (MEREX REBUTTAL)

MR. O'CALLAGHAN: Judge, there are more pages I'd like to have addressed.

THE COURT: I have no more pages presented to me, and we are going out.

MR. O'CALLAGHAN: That's a two-page --

THE COURT: You mean all of those?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: You go through those and you see if there's anything that has to do with commissions.

MR. KLEIN: Your Honor, you haven't ruled on relevance of any of this, have you?

THE COURT: No.

MR. KLEIN: We still have our right to object if and when he tries to bring it up in rebuttal.

THE COURT: I am only identifying what he alleges are the parts that deal with commissions.

MR. WEINER: Your Honor, would you like me to talk to Kevin, bring Kevin in? The jury is probably back now. You instructed them to come back at 2:30.

THE COURT: I know they are back, but this has been Mr. O'Callaghan's method all during this trial.

MR. O'CALLAGHAN: No, my method is to seek assistance several years ago, your Honor, concerning amendment to the complaint.

THE COURT: Please don't start that.

MR. O'CALLAGHAN: And I did not have assistance, and now we have the Egan-Fanneron issue, which was really around for a long time.

THE COURT: Which was before the Magistrate, and I guess this is the first time you heard that.
Pick out the parts.

MR. O'CALLAGHAN [sic]: Where did we leave off?
Do you know, Lynne, where we left off?

THE COURT REPORTER: No. I'm sorry.

MR. O'CALLAGHAN: I don't know either.

(Brief recess)

(In open court -- 3:25 p,m.)

(Jury not present)

THE COURT: I spent the lunch hour with many of your pages to the Egan deposition, and I told you the only thing I wanted to do was to identify anyplace in the Egan deposition where there was a mention of a Merex commission. We got halfway through, and then you said you showed me you had two pages long. And I told you to come out here and identify only those issues, those issues with the commission paid to Merex for your rebuttal. That is all I would permit on rebuttal.
I am not going to double-check the balance of what you have. But I am telling you now, we are going to bring the jury out, and don't you dare read anything into the record that does not show that Egan recognized a commission to be paid to Mr. Mertins or A.G.
Do you understand?

MR. O'CALLAGHAN: Your Honor, I don't think that that is an instruction that totally is comprehensible. I have pricing

sheets. He says commission. I don't think it's fair for me to have to conclude what was in his mind. It says commission at the time. I will not read in any of the issues you are relating to about other things that are not on rebuttal. But if the man says commission, I'll read it.

THE COURT: Before you read "commission," do you have any evidence that the word "commission" relates to the oral commission which is the only issue before this Court?

MR. O'CALLAGHAN: I submit that's the whole purpose of the exercise, with the deposition, your Honor. It's obvious that Fanneron was the controller and he was computing the price on the project.

THE COURT: Sir, that's not what I am you. I'm saying, the only commission that is relevant now is anything referable to the oral commission that you allege was promised to Mr. Mertins.

MR. O'CALLAGHAN: I submit that's the fair tenor of what he's saying. I don't know his mind. That's up for the jury to decide. But he's talking about commissions -- I believe we've narrowed this to post-April 3, or something, '48 [sic].

THE COURT: We have not narrowed anything. I am not a party to what you are about to do. And I want you to understand it. I think you do. I think the record is clear enough.
Bring the jury in.

MR. KLEIN: Your Honor, --

THE COURT: Yes?

MR. O'CALLAGHAN: Judge, there has to be some introductory questions before you get to the question of commission; otherwise, the question has no sense. I'm going to have to ask him what the document is, and the times. A couple of lines I'm going to have to ask him to explain what he means when he says commission at the end of this. It's really narrow.

THE COURT: Yes, Mr. Klein.

MR. KLEIN: Totally apart from the relevance issue, your Honor, I don't want the Court to lose sight of the fact that there's a threshold question about whether this deposition transcript can be used at all, whether Mr. Egan has been found to be unavailable.

Again, the only evidence that Mr. O'Callaghan produced this morning was an affidavit of service, dated today, suggesting that the last attempt they made to serve Mr. Egan was somewhere around March 12th or March 13th, which is about six weeks ago, and about a month before the trial started.

My understanding is that Mr. Egan is in New York. He's at his home, and he is subject to service.

THE COURT: Let's repeat again. Do we have Mr. Egan's phone number?

MR. WAHL: Yes, your Honor.

THE COURT: Would you please call Mr. Egan's home.

MR. WAHL: Yes, your Honor.

THE COURT: I hope it isn't going to be a repeat of what happened before.

MR. O'CALLAGHAN: Your Honor, I subpoenaed the man diligently for weeks.

THE COURT: Wait.

MR. O'CALLAGHAN: Now I want to use his deposition.

THE COURT: If Mr. Egan is at his home, I am not going to assume that he is not capable of being subpoenaed.

MR. WAHL: Your Honor, I can solve the problem without a phone call. I spoke with him approximately an hour and a half ago at home, and he is at home today. I can call him again, if you'd like.

THE COURT: Has he been away from his home within the last month?

MR. WAHL: He returned to New York approximately April 17th, your Honor.

THE COURT: All right.

Did you make an attempt to subpoena him after April 17th?

MR. O'CALLAGHAN: May I speak to my secretary, your Honor? It was a direction. I'm not sure of the date.

THE COURT: Just ask her. She's standing up. I assume that's your secretary.

MR. WAHL: Would you like me to try to call him again, your Honor?

THE COURT: No, no. If you represent you just spoke to him, I accept your word.

MR. WAHL: Thank you, your Honor.

THE COURT: And that was Mr. Wahl talking.

(Pause)

MR. O'CALLAGHAN: Your Honor, Ms. Rothkopf tells me an effort was made to subpoena him last week.

THE COURT: When?

MS. ROTHKOPF: I'm not sure of the exact date. I would really have to consult my record.

THE COURT: All right. Based upon the fact Mr. Wahl tells me that Mr. Egan is at his home now in Queens -- is it?

MR. WAHL: Your Honor, his address is in Floral Park,

New York, which is just in New Hyde Park, Long Island.

THE COURT: (Continuing) -- I find that there has not been sufficient effort; and, again, we will have a hearing. You bring in that process server after this trial is over.

What is next? If this man just like the other man you claimed you couldn't subpoena, when out of the clear blue sky we make a telephone call to their home, and they are at home --

MR. O'CALLAGHAN: Your Honor, this is the general counsel. Mr. Egan was employed by the company for 20 years. I submit there is a lot of relationship between Mr. Wahl and Mr. Egan and Mr. Kraljic and Mr. Redanz and the rest of them.

THE COURT: The only issue is whether Mr. Egan is able to be subpoenaed.

Now, if the issue --

MR. O'CALLAGHAN: I made an effort to subpoena him, twice.

THE COURT: If the issue comes up, and he makes a phone call today and the man is at home, then I find that he is not unavailable -- what's next?

MR. O'CALLAGHAN: Your Honor, I need this deposition. These documents are, as far as I'm concerned, essential to this case.

THE COURT: I don't want anymore argument. They are not essential if you can't use the Egan deposition.

Now, what's next?

MR. O'CALLAGHAN: May I have Mr. Egan on the stand to testify?

THE COURT: If you had subpoenaed him, you could.

MR. O'CALLAGHAN: I did make efforts to subpoena him. There's another subpoena out with another process server

now from last week to get him again.

THE COURT: What is next in your rebuttal?

MR. O'CALLAGHAN: Can we have Mr. Egan in on Monday to put him on the stand?

THE COURT: No, sir. That's not going to be done.
What is next?
You had your opportunity.

MR. O'CALLAGHAN: Your Honor, I take exception to this ruling about Mr. Egan.

THE COURT: You always take exception.
What is next?

MR. O'CALLAGHAN: I make an offer of proof of the Egan transcript, and these exhibits I selected at your request. May I put them in the record?

THE COURT: Sir, you can put them in an envelope and attach them to your papers.
What is next?
We have wasted, just absolutely wasted, an entire hour on this whole thing and the man is sitting at home.

MR. O'CALLAGHAN: I don't know he's sitting at home. Mr. Wahl is the general counsel.

THE COURT: Did you have his phone number?

MR. O'CALLAGHAN: No, Judge.

THE COURT: Did ask you Mr. Wahl for his phone number?

MR. O'CALLAGHAN: I did subpoena the man.

THE COURT: Did you ask Mr. Wahl for his phone

number?

MR. O'CALLAGHAN: I don't recall, Judge.

THE COURT: Did you ask Mr. Wahl for his phone number?

MR. O'CALLAGHAN: I don't recall.

THE COURT: Of course you didn't.

MR. O'CALLAGHAN: I don't recall if I did. There's been every effort to subpoena him.

THE COURT: Sir, that's a done deal now.
Now, what is next?

MR. O'CALLAGHAN: I had, likewise, sought to submit some of the selections from Mr. Fanneron's deposition into evidence.

I subpoenaed Mr. Fanneron. He was not here the first day of the trial. Two or three days ago we had a situation where I advised --

THE COURT: Is that the man who was at home when Mr. Wahl called?

MR. O'CALLAGHAN: That was Mr. Kraljic. The man appeared here as a witness for them.

Mr. Fanneron has never appeared anyplace in this trial, as far as I know.

THE COURT: Did you subpoena him?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Where does he live?

MR. O'CALLAGHAN: I don't recall. Metropolitan area.

MR. WAHL: Mr. Fanneron lives in Queens, your Honor. The address is 34-11 93rd Street, Jackson Heights, Queens, 11372.

Yesterday, Ms. Wierbicki asked me for the phone number, I believe, for Fanneron, and I provided it to them.

THE COURT: Ms. Wierbicki, did you call Mr. Fanneron's house?

MS. WIERBICKI: Actually, the number was given to Mr. O'Callaghan's secretary to make a call to have him appear today.

MS. ROTHKOPF: Yes.

THE COURT: Thank you.

Yes, ma'am, would you put your name on the record again.

MS. ROTHKOPF: My name is Wendy Rothkopf, and I did spend all yesterday calling Mr. Fanneron, and he was not at home.

THE COURT: All right.

Mr. Wahl, will you call his home now and see if he's at home.

Was a subpoena actually served on Mr. Fanneron?

MR. O'CALLAGHAN: Yes, your Honor.

THE COURT: Did you make an application to hold him in contempt or to enforce this subpoena?

MR. O'CALLAGHAN: A couple of days ago I asked you for assistance about this, at the time it came up. I asked you about it, and I've forgotten what the outcome was. I asked you, I represented to you he was not in the court, and I asked you for what assistance you would provide.

THE COURT: I made a record of it. I told you. You look at the record if you have forgotten. You have done nothing between then and today, as far as I know.

MR. O'CALLAGHAN: Your Honor, my secretary just indicated that she tried to call him.

THE COURT: I'm not getting into you and your internal office problems.

MR. O'CALLAGHAN: That's exactly what we tried to do.

(Mr. Wahl placed a call on the court telephone)

THE COURT: Let me speak to him.

(Pause)

THE COURT (on the telephone): Mr. Fanneron, where do you live?

Charles Fanneron.

Mr. Fanneron, where you live?

34-11 93rd Street, Jackson Heights.

That's in Queens. I'm just repeating it so the reporter can take it down.

Were you at home yesterday, sir? When were you at home?

I have to think about it. Let me see.

He's asking his wife: Where were we yesterday, Mary?

And what time did you get back home?

We were home in the morning. We took a ride over to Jersey, and we were back by 6 o'clock.

Mr. Fanneron, did you receive a subpoena from Mr. O'Callaghan, the plaintiff in this case against Fairchild?

And what did it direct that you do?

That you were to report to the courthouse on a Monday two weeks ago.

Did you come to the courthouse?

Any reason?

Yes. By whom?

Wait, wait. Hold on. You are going too fast.

I got a subpoena once before from Mr. O'Callaghan. Then I heard from Mr. Wahl the trial was delayed, and I never

heard from Mr. O'Callaghan.

Go ahead.

Relative to the trial being delayed.

And I spoke to Mr. Wahl, and he said I'd probably be notified by him.

Meaning who?

Meaning Mr. Wahl, if he were needed at trial.

All right, sir, thank you very much.

(End of telephone conversation)

THE COURT: My ruling is the same as far as Mr. Fanneron is concerned.

All right. Anything else, counsel?

MR. O'CALLAGHAN: I take exception. I think these rulings are precluding any fair trial, Judge.

THE COURT: Anything else, sir? I'm going to bring the jury in and let's --

MR. O'CALLAGHAN: I'm just looking, your Honor, for the -- if I may, for the date of when Mr. Fanneron was subpoenaed.

THE COURT: That's over and done with. I made a ruling on that.

MR. O'CALLAGHAN: I make an offer of proof that Mr. Fanneron --

THE COURT: This is --

MR. O'CALLAGHAN: -- the Fanneron exhibits that I intend to use --

THE COURT: No, no.

MR. O'CALLAGHAN: May I make an offer of proof, your Honor, on his deposition?

THE COURT: Not now that you have kept this jury --

MR. O'CALLAGHAN: When may I, your Honor?

THE COURT: Put in it envelope.

MR. O'CALLAGHAN: In the same fashion?

THE COURT: You have made three representations of witnesses that you could not subpoena, and three times each one of them was found at home.

MR. O'CALLAGHAN: By the general counsel of the corporation on trial for many millions of dollars.

THE COURT: Sir, do you have anything else to do before we bring in the jury?

MR. O'CALLAGHAN: May I speak to my client, Mr. Mertins, who is not at counsel table? May I speak to him a minute, your Honor?

THE COURT: Do you have any other evidence?

MR. O'CALLAGHAN: I'd like to speak to him about that.

THE COURT: You've got two minutes. Speak to him.

MR. O'CALLAGHAN: Thank you, Judge.

(Pause)

THE COURT: How long will it take to you sum up, Mr. Klein?

MR. KLEIN: Probably between 45 minutes and an hour. 40 minutes.

MR. WEINER: If I read it, your Honor, it might go a little more quickly, based upon prior --

MR. O'CALLAGHAN: Your Honor -- excuse me.

I've spoken to Mr. Mertins, because he indicated to me on the break --

THE COURT: I don't want to hear what your conversations are with your client. You have no right to disclose it.

MR. O'CALLAGHAN: Okay, your Honor, I'm trying to be cooperative with the Court.

THE COURT: Don't be cooperative where you are violating your ethical rules.

MR. O'CALLAGHAN: Your Honor, Mr. Mertins asked me to tell you -- so I don't think that's any violation of any rules. He asked me to tell you that he would like to take the stand, again, in rebuttal to the witnesses, Mr. Pighi and Mr. --

THE COURT: Wait just a minute.

MR. O'CALLAGHAN: -- who just testified. He would like to take the stand on rebuttal.

THE COURT: Mr. Mertins is not an attorney in my Court.

I ask you: Do you have any rebuttal evidence?

MR. O'CALLAGHAN: If Mr. Mertins would like to testify, I will ask him to take the stand.

THE COURT: In rebuttal.

MR. O'CALLAGHAN: In rebuttal.

THE COURT: You understand what rebuttal is.

MR. O'CALLAGHAN: To what occurred with the witnesses who were just on. There was a limited amount of testimony about what they said, and I would like for him, if he's

feeling capable of responding, --

THE COURT: Don't bring the sob story. The question is solely --

MR. O'CALLAGHAN: -- in rebuttal to what they had to testify to.

THE COURT: Mr. Klein?

MR. KLEIN: I'm not sure what he means until we hear the testimony, but I can't imagine there would be any subject matter that Mr. Mertins testified to that would be appropriate for rebuttal and wouldn't just be a rehash of his direct, changed to reflect what he heard on our case.

THE COURT: It will not be a rehash. It will be solely rebuttal testimony, and I don't want any business about he doesn't understand my questions, and I don't want any leading questions.

Bring the jury in. Bring your client up.

G.G. MERTINS, resumed

THE COURT: Now, Mr. Mertins, you are only to answer the questions that your counsel asked you that are permitted. Do you understand that?

THE WITNESS: It is better, I was told everything. It is better I reject this. Thank you very much.

(The witness left the witness stand)

(Jury present)

THE COURT: Counsel, do you have any rebuttal case?

MR. O'CALLAGHAN: I do, your Honor, but nothing further at this time.

THE COURT: This is the time to put it on if you have it.

MR. O'CALLAGHAN: Your Honor, upon the rulings you've made, your Honor --

THE COURT: Don't give us --

MR. O'CALLAGHAN: I have no further evidence that I'm able to submit.

THE COURT: Don't give us a speech. Either yes or no.

MR. O'CALLAGHAN: No further rebuttal, your Honor.

* * * *